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No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ABBOTT LABORATORIES,

Petitioner,

VS.

JUDITH SINDELL, ELI LILLY AND COMPANY, REXALL DRUG COMPANY, E.R. SQUIBB & SONS, INC., and THE UPJOHN COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

1. Does the rule of "market share liability" devised by the California Supreme Court to enable the respondent product liability claimant to recover damages from multiple defendants without proving that the conduct of any of them caused her injury violate petitioner's right to due process of law?

2. Given the confines of the Due Process Clause and the dictates of cooperative federalism, is it within the competence of California's courts to enforce a rule of tort liability that allows recovery of damages from a national manufacturer of a generic drug for injuries caused by its competitors' products on a theory that application of the rule in subsequent suits against other manufacturers will equitably spread the cost of all injuries that could be caused by the drug throughout the industry?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Petitioner Abbott Laboratories respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of California entered in this proceeding on March 20, 1980.

OPINIONS BELOW

The opinion of the Supreme Court of California is reported at ..... Cal.3d .....; 163 Cal.Rptr. 132; 607 P.2d 924, and is reproduced herein as Appendix A. An opinion in this proceeding by the California Court of Appeal, Second District, is reported at 149 Cal.Rptr. 138, and is reproduced herein as Appendix B.

JURISDICTION

The judgment of the Supreme Court of California (Appendix A, *infra*) was entered on March 20, 1980. A timely petition for rehearing was denied on May 7, 1980 (Appendix C, *infra*, p. C4), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution provides in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law; * * *

STATEMENT OF THE CASE

1. Petitioner is one of approximately 200 pharmaceutical companies that manufactured the synthetic estrogenic hormone "diethylstilbestrol" (DES) at various times during the period 1941-1971.[1] The judgment petitioner asks this Court to review was entered in an action filed by respondent Sindell against petitioner and ten other manufacturers of DES to recover damages for injuries she claims to have suffered as a result of her mother's ingestion of this drug while respondent was *in utero*.[2]

The trial court dismissed respondent's complaint on the ground that she admittedly could not identify the

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[1] Diethylstilbestrol is a synthetic estrogen that was developed by an English research team under the direction of E. C. Dodds, Courtland Professor of Biochemistry, Middlesex Hospital, London, in 1938. The inventors did not patent the drug, choosing to leave it in the public domain for whatever beneficial use might be made of it. In 1941, the U.S. Food and Drug Administration permitted the marketing of DES for a number of disorders unrelated to pregnancy. In 1947, the FDA permitted DES to be marketed for use in treatment of threatened and habitual miscarriage and other disorders of pregnancy. In 1952, the FDA declared DES to be no longer a "new drug" within the meaning of the Federal Food, Drug and Cosmetic Act of 1938, which meant that it was generally recognized among qualified experts as safe for its established uses and that no further new drug application would be required of any company before marketing it. *See* Federal Food, Drug and Cosmetic Act of 1938, Pub.L. No. 717, §§ 201(p), 505, 52 Stat. 1040 (1938) (current versions at 21 U.S.C. §§ 321(p), 355 (1976)).

[2] This case was filed in the Superior Court of Los Angeles County, California in August, 1976. Eleven pharmaceutical companies were named as defendants, in addition to 100 undescribed "John Doe" defendants. At this time, five of the named defendants remain as parties to the litigation, the balance having been dismissed or the appeal having been abandoned as to them.

manufacturer of the drug administered to her mother. The California Court of Appeal ordered the action reinstated, holding that, despite her inability to identify a manufacturer, respondent might recover either on principles of vicarious liability (*i.e.*, by showing that DES manufacturers engaged in concerted action) or by virtue of a rule that "where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm".[3] (App. B, pp. B11, B15).

On review, the Supreme Court of California concluded that no principle of tort liability familiar to the common law would permit respondent to maintain her action. It held that the conduct of the defendants alleged in the complaint would not support recovery on any theory of vicarious liability, either in the traditional sense of concert of action, or any theory of "industry-wide" liability based on the joint activities of its members. (App. A, pp. A16-A22). As for the burden-shifting rule of "alternative liability", the Court found it persuasive that, ". . . since any one of 200 companies which manufactured DES might have made the product which harmed plaintiff, there is no rational basis upon which to infer that any defendant in this action caused plaintiff's injuries, nor even a reasonable possibility that they were responsible" (App. A, pp. A13-A14; footnote omitted). "In such a context," the Court continued,

> . . . the possibility that any of the five defendants supplied the DES to plaintiff's mother is so remote that it would be unfair to require each defendant to

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[3] Restatement of Torts (Second), Section 433B(3). See also, *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948).

> exonerate itself. There may be a substantial likelihood that none of the five defendants joined in the action made the DES which caused the injury and that the offending producer not named would escape liability altogether. (App. A, p. A14).

Having said this, the Court (with 3 of the 7 justices dissenting) undertook to fashion a new remedy to meet the needs of a society where "advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer." (App. A, p. A23). Reasoning that, as between a plaintiff who cannot prove causation and defendants who cannot disprove it, the innocent plaintiff should prevail over the negligent defendants (App. A, p. A24), the Court felt it appropriate to approach the issue of causation "from a different perspective":

> . . . we hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose.
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> * * *
>
> If plaintiff joins in the action the manufacturers of a substantial share of the DES which her mother might have taken, the injustice of shifting the burden of proof to defendants to demonstrate that they could not have made the substance which injured plaintiff is significantly diminished. (App. A, pp. A25-A26).

The Court also concluded that its "market share" approach to focusing liability on certain manufacturers provided a "ready means to apportion damages among the defendants":

> . . . each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries.
>
> * * *
>
> Once plaintiff has met her burden of joining the required defendants, they in turn may cross-complaint against other DES manufacturers, not joined in the action, which they can allege might have supplied the injury-causing product.
>
> Under this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products. (App. A, p. A26).

The Court believed that applying the burden-shifting rule of the alternative liability theory in this modified form would sufficiently diminish the injustice that led the Court to refuse to apply the rule with its full force. The Court reasoned that the liability-fixing aspect of its market share approach lessened the possibility that none of the defendants before the Court had produced the offending product (App. A, p. A25) and that the damage-apportionment aspects of its theory would assure that the damages for which each defendant might be held responsible would be approximately equivalent to the injuries its products were likely to cause. (App. A, p. A25).

In any given multiple-defendant "nonidentification" case where liability is founded upon this theory, at best all but one, and quite possibly all, of the defendants will pay a portion of damages that did not flow from their products. Whether a particular manufacturer out of the hundreds of potential defendants is held liable in any particular case will depend upon whether it is included as a defendant along with others whose market shares add up to a "substantial" collective market share.

The California Court justified this result—which it recognized as being unjust in any one case viewed in isolation—by reasoning that the injustice would work itself out in future cases, *i.e.*, that the defendant who pays for a portion of the damage caused by another manufacturer in one case, will find his redress in the future case where his co-defendants pay a portion of the damage caused by *his* product. As the *Sindell* majority explained it:

> Most of [defendants'] arguments . . . are based upon the assumption that one manufacturer would be held responsible for the products of another or for those of all other manufacturers. . . . But under the rule we adopt, each manufacturer's liability for an injury would be approximately equivalent to the damages caused by the DES it manufactured. (App. A, p. A26; footnote omitted).

The California Supreme Court's belief that justice will be done in DES cases over the long run because all damages caused by DES will be spread to those who manufactured it necessarily assumes that its theory of liability will be adopted or honored in all other jurisdictions, that defendants who are held liable will generally be able to spread the liability to others through cross-complaints, that the inability of plaintiffs to identify the offending product will be uniform in the case of the products of all manufacturers, and that the damage awards in these future cases will be roughly the same, regardless of plaintiff, jury, or jurisdiction.

2. The market share liability rule announced by the California Supreme Court has no antecedents in the law of that or any other jurisdiction. None of the parties to this appeal or the companion appeal in *Rogers v. Rexall Drug Co.* had proposed such a rule, and neither the trial court nor the intermediate Court of Appeal had con-

sidered it. When the California Supreme Court first announced this new liability rule in its opinion of March 20, 1980, the petitioner and the other defendants filed timely petitions for rehearing in which they objected to the rule as a violation of the Fourteenth Amendment's guarantee of due process of law (*See* Appendix C, pp. C1-C3). On May 7, 1980, these petitions for rehearing were denied without opinion.

3. The California Supreme Court's judgment plainly is final on petitioner's Due Process claims and is not subject to further review in the state courts. Petitioner will be liable for damages if the elements of the state cause of action are proved in the lower court proceedings the California Supreme Court has revived. Of course, petitioner might prevail at trial on nonfederal grounds, but if the California Supreme Court erroneously rejected petitioner's claims of unconstitutionality, there should be no trial at all. Under these circumstances, this Court should treat the California Supreme Court's decision on the federal constitutional issue as a final judgment for the purposes of 28 U.S.C. §1257 and take jurisdiction in this case without awaiting the completion of further proceedings in the lower state courts. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975); *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977).

The alternative would be to await the completion of what promises to be a long and arduous trial and the formality of a second rejection of petitioner's federal claims by the California Supreme Court. *Cf. Mills v. Alabama*, 384 U.S. 214, 217 (1966). The potential waste of judicial resources that postponement of consideration of the issues raised here would entail is much greater than that associated with trial of this case alone. The

novel rule of liability adopted in California opens the way for hundreds of lawsuits that would not have been maintainable under prior law.[4]

A substantial increase in the volume of products liability suits filed in state and federal courts is not the only consequence to be expected of the California decision. The numbers of parties and issues involved in these suits will increase exponentially. There are complaints now on file in California which name as many as 162 companies as defendants.[5] Each plaintiff relying on the California theory of recovery wil' sue multiple defendants, those defendants will attempt to bring in others by way of cross-actions, and those who cannot be brought in will be sued in separate collateral actions for contribution. The California Supreme Court's judgment on the liability of petitioner and other manufacturers similarly situated is fundamental to the further conduct of this case, other cases now pending, and cases that will be filed in the future. It introduces into the litigation complex issues of proof of "relevant markets" and "market shares" and dictates a complicated third-party practice in virtually every case. *Compare, Gillespie v.*

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[4] Petitioner already has been made a party to nearly 70 similar actions, including six cases in which plaintiffs seek to represent a state-wide class of DES daughters. The class actions include this case, and *Payton v. Abbott Labs, et al.*, U.S. District Court (D.Mass.), No. 76-1514-S; *Winchell v. Eli Lilly and Co., et al.*, U.S. District Court (D.Conn.), No. B80 127; *Birckhead v. Eli Lilly & Co., et al.*, U.S. District Court (D.Md.), No. J-80-874; *Mertens v. Abbott Labs, et al.*, U.S. District Court (D. N.H.), No. C80-223D; and *Rogers v. Abbott Labs, et al.*, U.S. District Court (C.D. Cal.), No. CV 76-2283. An order conditionally certifying a plaintiff class for the trial of certain limited issues has been entered by one District Court, *Payton v. Abbott Labs*, 83 F.R.D. 382 (D.Mass. 1979).

[5] *See, e.g., Benny v. Abbott Laboratories, et al.*, Superior Court of Alameda County, No. 525322-5.

U.S. Steel Corp., 379 U.S. 148, 153 (1964). Given the fact that the litigation costs of a *single party* in a routine products liability case frequently reach or exceed $50,000,[6] it is difficult to over-estimate the enormous toll that this rule will take on the resources of litigants, the courts and the public generally.[7]

There are additional reasons why immediate review of this judgment is warranted. The new species of liability created by the California Supreme Court casts a shadow over the entrepreneurial judgments of manufacturers of generic drugs, the judgments of those who are considering entry into such a market, and the judgments of the insurers who must identify and quantify the novel risks of loss posed by this new approach.

The California Court's decision also poses an immediate threat to federal policy designed to foster price competition in the marketing of prescription drugs. Section 502(e) of the Federal Food, Drug and Cosmetic Act mandates the clear identification of drugs by their generic names in labelling, in order to "bring to the attention of doctors and patients the fact that many of the drugs sold under familiar trade names are actually identical to drugs sold under their 'established' names or less familiar names *at significantly lower prices.*" *Abbott Laboratories v. Gardner*, 387 U.S. 136, 138 (1967) (emphasis supplied); *see also*, S. Rep. No. 1744, 87th

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[6] Testimony of the General Counsel of Wyeth Laboratories, *Supplemental Hearings before the Subcommittee on Health and Environment of the Committee on Interstate and Foreign Commerce, Ninety-Fourth Congress, 2d Session*, June 28, 1976, Serial No. 94-113 at p. 112.

[7] A circumstance that has not escaped popular notice. *See* Kingsley, *Fate and Lawsuits*, The New Republic, June 14, 1980, p. 21.

Cong., 2d Sess. (1962), 1962 U.S. Code Cong. & Admin. News 2884, 2894; Letter from President Kennedy to Senator Eastland ("[T]his legislation will substantially improve the ability of the drug industry to serve the Nation and help provide consumers with quality drugs at low competitive prices.")[8] *Id.* at 2896. The additional cost factor attached to the distribution of multiple-source drugs by California's new species of liability directly conflicts with the federal interest in reduction of the cost of such pharmaceutical products.

[8] This policy has also become an integral part of cost control under federal Medicaid programs. See *Maximum Allowable Costs for Drugs*, Office of the Secretary of Health, Education and Welfare (July 25, 1976); 42 C.F.R. § 447.332 (Oct. 1, 1979).

REASONS FOR GRANTING THE WRIT

By the decision of its highest court in this case, California becomes the first state in the history of American law to impose liability on multiple competing manufacturers for injuries caused by a product manufactured by one of them *solely* because the products they manufacture are identical. In so doing, California has abandoned core elements of tort liability in favor of a remedy that its courts are institutionally incompetent to confer on plaintiffs seeking compensation for personal injuries.[9]

1. The question presented by this case is basic: does the Constitution in any way limit the ability of state courts to fashion common law remedies for "tortious" injuries to the person? Those limits do exist,[10] and

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[9] All the landmark doctrinal changes in tort law have been the product of judges' grappling with the concept of "duty" or "fault" as elements of a tort. The doctrines of strict liability and comparative negligence are familiar examples. The *res ipsa loquitur* evidentiary rule is a variation on the same theme. (Even in the area of tort duties, courts have felt incompetent to take the final step of imposing liability for injurious conduct that is "faultless". *See Cochran v. Brooke*, 409 P.2d 904, 907 (Ore. 1965); *Gaston v. Hunter*, 121 Ariz. 33, 588 P.2d 326, 341 (1978); *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121, 126 (9th Cir. 1968).) There is a world of difference, however, between the familiar judicial task of defining what injury-causing conduct is "tortious", and attaching liability to "tortious" conduct regardless of whether it actually has resulted in injury to anyone, which is what the California Supreme court has done in this case. A direct, factual, connection between the conduct complained of and the injury of the complainant is a *sine qua non* of a "tort" under American law. Without it, there would be no distinction between economic exactions made by the government in the form of damages, and those made in the form of taxes, assessments, fees, or criminal penalties.

[10] It is well-settled, of course, that state judicial decisions applying state common law are not immune to constitutional scrutiny. *See, e.g., Shelly v. Kraemer*, 334 U.S. 13 (1948);

(Footnote continued on following page)

the extraordinary policy of multiple-defendant liability adopted by the California Supreme Court in this case exceeds them.

In resolving the contending claims of private litigants the courts of California are not free to disregard the principles of procedural regularity and fairness that define "due process of law". See generally, *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971). Fundamental among these is the principle that judicial authority must confine itself to the universe of concrete legal rights and duties represented by the parties in the case before it.

There exist at least rough boundaries beyond which the exercise of judicial power, while regular in form, ceases to be so in substance. Those limits are defined by the prohibitions of the Fourteenth Amendment's Due Process Clause. *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 234-35 (1897). Identifying the limits courts must observe when bringing the powers of government to bear on the rights of individuals has occupied this Court on many occasions. *See, e.g., United States v. Wiltberger*, 18 U.S. 35, 43 (1820); *Rees v. City of Watertown*, 86 U.S. 107, 119-122 (1873); *Hovey v. Elliott*, 167 U.S. 409, 415-17 (1897); *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935); *Ohio Bell Telephone Co. v. Public Utilities Comm'n of Ohio*, 301 U.S. 292, 300-05 (1937); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 611 (1974).

As Justice Frankfurter aptly put it in his opinion for the Court in *Rochin v. California*, 342 U.S. 165, 170 (1952):

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[10] *continued*
Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Hughes v. Washington*, 389 U.S. 290, 297-98 (1967) (Stewart, J., concurring).

> The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process.

Is there any doubt, for example, that it would offend those limits for a judge to award damages in a products liability case to a plaintiff who could not prove any injury, simply because he felt the conduct of the defendant potentially injurious to *someone*? Would a court be competent to enter a judgment against all manufacturers engaged in a particular hazardous activity in order to compensate the employee of one of them for injuries suffered in his employment? *Cf. Rees v. City of Watertown, supra*, at 119-121.

But for the limits of the Due Process Clause, our law might include today many misconceived judicial experiments of the past. Just as the perceived needs of modern society may tempt courts to seek innovative judicial solutions, as they did in this case, so may those judicial experiments present fresh occasions for measuring judicial action against the procedural due process the Constitution guarantees those litigants whose rights and duties will be affected by it. This is such a case. Its solution is innovative, but not "judicial" in any constitutionally acceptable sense.

2. The novel compensation policy announced in this case has its genesis in the California Supreme Court's belief that some persons injured by DES should not go uncompensated because they cannot identify a particular manufacturer while others who can identify a

particular manufacturer may recover damages. The Court's solution was to relieve the plaintiffs who could not make identification from the burden of doing so, while retaining identification as an element of the action in those cases where the plaintiffs *could* prove it.

On one level, this is nothing more than a case of a court arbitrarily limiting the evidence a litigant will be allowed to present in his defense in order to dictate a result the court perceives to be socially desirable. Under the California market share rule, a drug manufacturer whose DES production represented 10 per cent, or one per cent, or one-tenth per cent, of a "relevant market" will not be allowed to advance the fact of that small market share as circumstantial evidence of the extreme improbablility that his product caused plaintiff's injury—*if* that manufacturer happens to be joined with other defendants whose market shares, when combined with his, collectively amount to a "substantial" share of the relevant market. If that manufacturer were sued individually in a case where the plaintiff alleged that her injury was caused by its product and she tried to prove that element of her case on the basis of an inference of causation from evidence of the amount of DES marketed by that manufacturer, the rules of evidence would compel a defense verdict.[11] And were a court in such a case to instruct the jury that proof of a 10 per cent market share established as a matter of law that the defendant's

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[11] *See, e.g., Aymond v. Texaco, Inc.*, 554 F.2d 206 (5th Cir. 1977); *Guenther v. Armstrong Rubber Co.*, 406 F.2d 1315 (3d Cir. 1969); *Wetzel v. Eaton Corporation*, 62 F.R.D. 22 (D. Minn. 1973); *Kamosky v. Owens-Illinois Glass Co.*, 89 F.Supp. 561 (M.D. Pa. 1950); *Thompson-Hayward Chem. Co. v. Childress*, 169 So.2d 305 (Ala. 1964); Anno. 51 ALR 3d 1344.

product injured the plaintiff, that instruction surely would be condemned as a violation of the defendant's right to procedural due process of law. Collective market share evidence is constitutionally insufficient to support a judgment against this petitioner for a plaintiff's damages, whether it be rationalized as creating an evidentiary presumption, or as shifting the burden of proof, or by whatever other fiction an imaginative court might invent. *Cf. Jackson v. Virginia*, 443 U.S. 307, 314 (1979); *New York Times Co. v. Sullivan*, 376 U.S. 254, 283-288 (1964); *Thompson v. Louisville*, 362 U.S. 199, 206 (1960).

3. California's new rule of tort liability is constitutionally objectionable on a much deeper level, however. The California Court's market share theories of liability and damage apportionment are premised on a concept of distributive justice, *i.e.*, the notion that an unfair or arbitrary exaction of damages from a defendant in any particular case will be cured or balanced out by the damages awarded in other cases in the future. The constitutional vice of this theory lies in the very fact that the Court attempted to formulate a *judicial* mechanism for equitably spreading the costs of injuries caused by a product among the hundreds of members of the industry engaged in manufacturing the product. The Court sought to achieve by indirection a result that it could not directly justify upon any principle of vicarious liability or collective responsibility known to the law.

Ironically, the California Court would have come closer to achieving its goal had it followed the logic of its theory to its conclusion and declared manufacturer identification immaterial to the right to recover in all DES

cases, whether or not a manufacturer could be identified. All plaintiffs would be spared the burden of proving which manufacturer produced the drug that injured them and relieved of the risk that the product came from a judgment-proof manufacturer. Defendants, on the other hand, would be protected against the prospect of paying the total damages in cases where their product could be identified in addition to their "fair" share of damages in unidentified product cases.

The problem with that approach, of course, is that it lacks even the colorable judicial legitimacy of the solution the Court did settle on. Once inability to identify a product manufacturer is eliminated as the rationale for allowing recovery in cases like this, it can only be explained in terms of a policy judgment favoring the transfer of economic losses from one class to another. With equal reason, a court might declare that a person injured by a speeding automobile could recover his damages from any or all motorists convicted of speeding. The multiple-defendant liability scheme the California Court *did* adopt is simply more arbitrary—so much so that it would be constitutionally suspect even if it were a creation of the California legislature.

The California Supreme Court rests its justification for imposing this new species of liability on drug manufacturers solely on the basis that it would result in the equitable distribution of DES losses among those who marketed the drug. The Court failed to recognize, however, that its scheme of distributive justice is repugnant to the fundamental requirements of procedural due process expressed by this Court in decisions such as *Pennoyer v. Neff*, 95 U.S. 714 (1877), *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940), *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and

Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 315 (1949).[12] The principles of in personam jurisdiction and vicarious representation set out in these decisions place limits on a court's power to bind the rights of absent parties—limits that pose an insurmountable barrier to achieving the equitable distribution of present and future damages attributable to DES through the judicial processes of the State of California.

The California Court's perception of the fairness with which its market share theory will operate is based on a number of questionable assumptions, the more troublesome of which are illustrated by the following example: Assume that all of the DES that defendant X ever manufactured would result in injury to only one person. Under the California theory, defendant X will have discharged its liability for the "approximate equivalent" of the "damages caused by the DES it manufactured" when it has been found liable for 10 per cent of the damages in 10 cases. If, however, X is held liable in a case where a plaintiff *can* identify X's product, X will have been held liable for *twice* the damages all its DES could have caused, according to the California theory. There is nothing in the *Sindell* opinion to suggest that X would be immune to liability in the 11th case brought against it, or that X having previously suffered judgment in a case where its product was identified, could set that judgment up in bar to a subsequent case brought against it under the California theory on the ground that it had already paid for all the damage caused by its product.

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[12] *See also, Penn-Central Merger Cases*, 389 U.S. 486, 542 (1968) (Opinion of Douglas, J.); *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 175 (1941) (Stone, J., dissenting); *Riley v. New York Trust Co.*, 315 U.S. 343, 356 (1942) (Stone, C.J., concurring).

Nor can California protect the manufacturer who has paid its "equivalent share" of all DES damage through California judgments and still faces substantial judgments in favor of DES plaintiffs in other jurisdictions across the nation. There is no principle of full faith and credit, res judicata, or collateral estoppel upon which a defendant so situated would be able to defeat any subsequent claims made against it, even if that meant that it ultimately would be forced to pay damages tenfold the amount California would exact if the powers of its courts ran nationwide.

California also lacks the power to protect the defendant manufacturer who cannot bring in another manufacturer by way of cross-complaint, but must pursue it in an action for contribution in another jurisdiction. What if the other jurisdiction does not allow contribution on California's terms, or not at all? There is no principle of law that would require the courts of any other jurisdiction to honor either the California judgment giving rise to the action for contribution, or California's law of contribution itself.

California cannot hail into its courts a regional manufacturer[13] whose products never were sold in California in order to reconstitute a relevant market in

[13] The presence of regional differences in distribution patterns has already been documented in other DES litigation. For example, affidavits filed in *Frodesen v. Eli Lilly & Co., et al.*, U.S. District Court (W.D.Wash.), No. 76-1312, establish that Kremers-Urban Co., a Wisconsin firm, did not distribute the product west of the Rocky Mountains and that Blue Line Chemical Co., a St. Louis manufacturer, confined its distribution to the Central U.S. In *Wood v. Eli Lilly Co.*, U.S. District Court (E.D.Pa.), an affidavit filed by J. F. Hartz Co. states that it did not market DES outside the Detroit metropolitan area.

another state[14] for the purpose of contribution. *World-Wide Volkswagen Corp. v. Woodson*, ... U.S. ....., 100 S.Ct. 559 (1980) establishes that the bare occurrence (or manifestation) of injury in the forum state is an inadequate basis for the assertion of jurisdiction over a nonresident defendant having no other contacts with that state. The predictable result is that California judgments in such cases will not be shared by all the participants in the foreign market, but only by those who chance to have sufficient contacts with California to support suit against them there. In the cases in question, where the *absence* of any established causal relationship between the foreign manufacturer's activities and the plaintiff's injuries is the very basis for invocation of the California Court's rule, constitutional restraints on the extraterritorial reach of a state court's authority would completely frustrate the operation of the market share liability scheme.

The only option available to defendants who must bear the burden of such judgments is to pursue other participants in the foreign market by independent actions wherever they may be found, which is no option at all. Some states may refuse to entertain any such contribution action as contrary to strong public policy of the forum. *See* Restatement (Second), Conflict of Laws,

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[14] The relevant market in any particular case will be the market in which the plaintiff's mother obtained the drug she ingested. See App. A, pp. A25-A26. Thus, a relevant market could be a state, a portion of a state, a city, a neighborhood, a shopping center, a hospital, a physician's practice, or a single pharmacy. "Relevant markets" also might be defined temporally, as well as geographically, since not all manufacturers marketed DES during the same time periods. Identifying the relevant markets contemplated by the California theory is one of the major problems it would present a trier of fact. According to census data, more than 50 per cent of the females living in California in 1970 were born in other states.

Section 90 (1971). Some states may choose to apply the law of some jurisdiction other than California. In cases involving multistate activity, a state court is largely free of any constitutional constraints in choosing what substantive law it will apply. *Richards v. United States*, 369 U.S. 1, 15-16 (1962). The approaches states have taken to the issues raised by contribution are not only extremely varied but exceedingly inconsistent. *See* Oldham, *Indemnity and Contribution Between Strictly Liable and Negligent Defendants*, 28 Fed. Ins. Coun. Q. 139, 145 fn. 35 (1978).

Consider the position of a group of defendants whose liability, and whose respective shares of the liability, have been determined in litigation with one plaintiff. Will the findings of "relevant" market shares made in that case be binding on a different complement of defendants in the next case arising out of that "relevant market"? Would those findings be binding on the manufacturer sued for contribution by one or more of these defendants? Petitioner is aware of no constitutionally permissible application of the rules of res judicata or collateral estoppel that would prevent the relitigation of these issues in almost infinite permutations and with conflicting results. How would California propose to protect drug manufacturers against such inequity?

Any effort to attain the equitable distribution of losses envisioned by the California Supreme Court is destined to collapse of its own weight into a completely arbitrary regime of judicially administered transfer payments. It necessarily involves, indeed requires for its operation, case-by-case judicial determination of relevant markets—a tremendously complex inquiry even when viewed on a purely theoretical level. When it is considered that the same unavailability of evidence that the

Court pointed to as justification for relieving plaintiffs of the burden of proving causation works with much greater force against those defendants who must prove and enforce market shares, *inter se*, the problems attendant upon apportioning damages equitably become intractable.

There comes a point where adjustment of the rules of law governing private liability for the economic compensation of losses caused by personal injury cannot be justified by the impulse to do equity in the circumstances of a particular case, no matter how well-meaning the judicial motive or desirable the end. It must be accepted that some problems lie beyond judicial solution. *Cf. Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018-19 (2d Cir. 1973); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, ... F.2d ..... (3d Cir. 1980) 5 Trade Reg. Rep. (CCH) ¶ 63,421 at 76,196-98; *Ralston v. Volkswagenwerk, A.G.*, 61 F.R.D. 427, 433 (W.D. Mo. 1973); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 780 (1961) (Whittaker, J., concurring in part; dissenting in part).

To impose liability on *this* petitioner in *this* case on the entirely speculative assumption that any injustice done it now will be undone in some undertermined number of cases expected to arise in the future is not the judicial process due this petitioner, it is naked judicial arbitrariness.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Supreme Court of California to review its judgment herein.

Respectfully submitted,

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August 5, 1980

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JUDITH SINDELL, *Plaintiff and Appellant,* vs. **ABBOTT LABORATORIES, et al.,** *Defendants and Respondents.*	**L.A. 31063**
MAUREEN ROGERS, *Plaintiff and Appellant,* vs. **REXALL DRUG COMPANY, et al.,** *Defendants and Respondents.*	

[OPINION FILED MARCH 20, 1980]

This case involves a complex problem both timely and significant: may a plaintiff, injured as the result of a drug administered to her mother during pregnancy, who knows the type of drug involved but cannot identify the manufacturer of the precise product, hold liable for her injuries a maker of a drug produced from an identical formula?

Plaintiff Judith Sindell brought an action against eleven drug companies and Does 1 through 100, on behalf of herself and other women similarly situated. The complaint alleges as follows:

Between 1941 and 1971, defendants were engaged in the business of manufacturing, promoting, and marketing diethylstilbesterol (DES), a drug which is a

synthetic compound of the female hormone estrogen. The drug was administered to plaintiff's mother and the mothers of the class she represents,[1] for the purpose of preventing miscarriage. In 1947, the Food and Drug Administration authorized the marketing of DES as a miscarriage preventative, but only on an experimental basis, with a requirement that the drug contain a warning label to that effect.

DES may cause cancerous vaginal and cervical growths in the daughters exposed to it before birth, because their mothers took the drug during pregnancy. The form of cancer from which these daughters suffer is known as adenocarcinoma, and it manifests itself after a minimum latent period of 10 or 12 years. It is a fast-spreading and deadly disease, and radical surgery is required to prevent it from spreading. DES also causes adenosis, precancerous vaginal and cervical growths which may spread to other areas of the body. The treatment for adenosis is cauterization, surgery, or cryosurgery. Women who suffer from this condition must be monitored by biopsy or colposcopic examination twice a year, a painful and expensive procedure. Thousands of women whose mothers received DES during pregnancy are unaware of the effects of the drug.

In 1971, the Food and Drug Administration ordered defendants to cease marketing and promoting DES for the purpose of preventing miscarriages, and to warn physicians and the public that the drug should not be used by pregnant women because of the danger to their unborn children.

During the period defendants marketed DES, they knew or should have known that it was a carcinogenic substance, that there was a grave danger after varying periods of latency it would cause cancerous and

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[1] The plaintiff class alleged consists of "girls and women who are residents of California and who have been exposed to DES before birth and who may or may not know that fact or the dangers" to which they were exposed. Defendants are also sued as representatives of a class of drug manufacturers which sold DES after 1941.

precancerous growths in the daughters of the mothers who took it, and that it was ineffective to prevent miscarriage. Nevertheless, defendants continued to advertise and market the drug as a miscarriage preventative. They failed to test DES for efficacy and safety; the tests performed by others, upon which they relied, indicated that it was not safe or effective. In violation of the authorization of the Food and Drug Administration, defendants marketed DES on an unlimited basis rather than as an experimental drug, and they failed to warn of its potential danger.[2]

Because of defendants' advertised assurances that DES was safe and effective to prevent miscarriage, plaintiff was exposed to the drug prior to her birth. She became aware of the danger from such exposure within one year of the time she filed her complaint. As a result of the DES ingested by her mother, plaintiff developed a malignant bladder tumor which was removed by surgery. She suffers from adenosis and must constantly be monitored by biopsy or colposcopy to insure early warning of further malignancy.

The first cause of action alleges that defendants were jointly and individually negligent in that they manufactured, marketed and promoted DES as a safe and efficacious drug to prevent miscarriage, without adequate testing or warning, and without monitoring or reporting its effects.

A separate cause of action alleges that defendants are jointly liable regardless of which particular brand of DES was ingested by plaintiff's mother because defendants collaborated in marketing, promoting and testing the drug, relied upon each other's tests, and adhered to an industry-wide safety standard. DES was produced from a common and mutually agreed upon formula as a fungible drug interchangeable with other brands of the same product; defendants knew or should have known

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[2] It is alleged also that defendants failed to determine if there was any means to avoid or treat the effects of DES upon the daughters of women exposed to it during pregnancy, and failed to monitor the carcinogenic effects of the drug.

that it was customary for doctors to prescribe the drug by its generic rather than its brand name and that pharmacists filled prescriptions from whatever brand of the drug happened to be in stock.

Other causes of action are based upon theories of strict liability, violation of express and implied warranties, false and fraudulent representations, misbranding of drugs in violation of federal law, conspiracy and "lack of consent."

Each cause of action alleges that defendants are jointly liable because they acted in concert, on the basis of express and implied agreements, and in reliance upon and ratification and exploitation of each other's testing and marketing methods.

Plaintiff seeks compensatory damages of $1 million and punitive damages of $10 million for herself. For the members of her class, she prays for equitable relief in the form of an order that defendants warn physicians and others of the danger of DES and the necessity of performing certain tests to determine the presence of disease caused by the drug, and that they establish free clinics in California to perform such tests.

Defendants demurred to the complaint. While the complaint did not expressly allege that plaintiff could not identify the manufacturer of the precise drug ingested by her mother, she stated in her points and authorities in opposition to the demurrers filed by some of the defendants that she was unable to make the identification, and the trial court sustained the demurrers of these defendants without leave to amend on the ground that plaintiff did not and stated she could not identify which defendant had manufactured the drug responsible for her injuries. Thereupon, the court dismissed the action.[3]

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[3] There are minor variations in the procedures employed as to the various defendants. Thus, for example, Eli Lilly and Company filed a motion for summary judgment, or alternatively judgment on the pleadings, rather than a demurrer; the court treated the motion as a demurrer.

(Footnote continued on following page)

This appeal involves only five of ten defendants named in the complaint.[4]

Plaintiff Maureen Rogers filed a complaint containing allegations generally similar to those made by Sindell. She seeks compensatory and punitive damages on her own behalf, and on behalf of a class described in substantially the same terms as in Sindell's complaint, as well as equitable relief comparable to that sought by

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[3] *continued*

The demurrer of Abbott Laboratories, the first defendant to file a demurrer and the first to secure a dismissal, was sustained with leave to amend on the ground that plaintiff had failed to allege that a product manufactured by Abbott had caused her injuries (as opposed to the reason given by the trial court for sustaining the demurrers of the other defendants that plaintiff expressly stated that she could not identify a particular manufacturer). Upon plaintiff's failure to amend the complaint, the action was dismissed as to Abbott. A few days after the dismissal, plaintiff stated in a brief in opposition to the demurrers filed by defendants other than Abbott that she could not make the identification.

Abbott asserts that as to it the issue we consider on the appeal is not properly raised because plaintiff's statement that she could not identify the manufacturer was not made until after the action had been dismissed as to Abbott. This contention is without merit. Plaintiff's failure to amend her complaint after Abbott's demurrer was sustained with leave to amend was based upon her inability to identify a specific manufacturer. Clearly, Abbott interpreted the complaint in this fashion, for it moved for dismissal on the ground that the complaint alleges that plaintiff "does not know the identity of the drug . . . ingested" by her mother. Thus, Abbott may not now claim that the complaint is insufficient to raise the issue involved in this appeal.

The trial court did not determine other issues raised by the complaint, such as whether the case was properly brought as a class action.

[4] Abbott Laboratories, Eli Lilly and Company, E.R. Squibb and Sons, The Upjohn Company, and Rexall Drug Company are respondents. The action was dismissed or the appeal abandoned on various grounds as to other defendants named in the complaint; e.g., one defendant demonstrated it had not manufactured DES during the period plaintiff's mother took the drug.

Sindell. The trial court sustained demurrers of E.R. Squibb & Sons, The Upjohn Company, and Rexall Drug Company.[5] Subsequent to the dismissal of her action against these defendants, Rogers amended the complaint to allege that Eli Lilly and Company, one of the defendants named in her complaint, had manufactured the drug used by her mother. Although Sindell's action and the present case have been consolidated on appeal, much of the discussion which follows will apply to Rogers only if she does not succeed in establishing that Eli Lilly and Company manufactured the DES taken by her mother. "Plaintiff" as used in this opinion refers to Sindell, and we discuss only the allegations of Sindell's complaint.

This case is but one of a number filed throughout the country seeking to hold drug manufacturers liable for injuries allegedly resulting from DES prescribed to the plaintiffs' mothers since 1947.[6] According to a note in the Fordham Law Review, estimates of the number of women who took the drug during pregnancy range from 1½ million to 3 million. Hundreds, perhaps thousands, of the daughters of these women suffer from adenocarcinoma, and the incidence of vaginal adenosis among them is 30 to 90 percent (Comment, *DES and a Proposed Theory of Enterprise Liability* (1978) 46 Fordham L.Rev. 963, 964-967 [hereafter Fordham Comment].) Most of the cases are still pending. With two exceptions,[7]

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[5] While the trial court did not specify the ground upon which the demurrers were sustained, the points and authorities filed by the parties emphasized the failure of Rogers to identify a particular manufacturer as the source of her injuries, and we may assume for the purpose of this appeal that this was the basis of the court's order.

[6] DES was marketed under many different trade names.

[7] In a recent New York case a jury found in the plaintiff's favor in spite of her inability to identify a specific manufacturer of DES. An appeal is pending. (Bichler v. Eli Lilly and Co. (Sup.Ct.N.Y. 1979).) A Michigan appellate court recently held that plaintiffs had stated a cause of action against several manufacturers of DES even though identification could not be made. (Abel v. Eli Lilly and Co. (decided Dec. 5, 1979) Docket No. 60497.) That decision is on appeal to the Supreme Court of Michigan.

those that have been decided resulted in judgments in favor of the drug company defendants because of the failure of the plaintiffs to identify the manufacturer of the DES prescribed to their mothers.[8] The same result was reached in a recent California case. (McCreery v. Eli Lilly & Co. (1978) 87 Cal.App.3d 77, 82-84.) The present action is another attempt to overcome the obstacle to recovery.

We begin with the proposition that, as a general rule, the imposition of liability depends upon a showing by the plaintiff that his or her injuries were caused by the act of the defendant or by an instrumentality under the defendant's control. The rule applies whether the injury resulted from an accidental event (e.g., Shunk v. Bosworth (6th Cir. 1964) 334 F.2d 309) or from the use of a defective product. (E.g., Wetzel v. Eaton Corporation (D.Minn. 1973) 62 F.R.D. 22, 29-30; Garcia v. Joseph Vince Co. (1978) 84 Cal.App.3d 868, 873-875; and see annot. collection of cases in 51 A.L.R.3d 1344, 1351; 1 Hursh and Bailey, American Law of Products Liability 2d (1974) p. 125.)

There are, however, exceptions to this rule. Plaintiff's complaint suggests several bases upon which defendants may be held liable for her injuries even though she cannot demonstrate the name of the manufacturer which produced the DES actually taken by her mother. The first of these theories, classically illustrated by Summers v. Tice (1948) 33 Cal.2d 80, places the burden of proof of causation upon tortious defendants in certain circumstances. The second basis of liability emerging from the complaint is that defendants acted in concert to cause injury to plaintiff. There is a third and novel approach to the problem, sometimes called the theory of "enterprise liability," but which we prefer to designate

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[8] E.g., Gray v. United States (S.D. Texas 1978) 445 F.Supp. 337. In their briefs, defendants refer to a number of other cases in which trial courts have dismissed actions in DES cases on the ground stated above.

by the more accurate term of "industry-wide" liability,[9] which might obviate the necessity for identifying the manufacturer of the injury-causing drug. We shall conclude that these doctrines, as previously interpreted, may not be applied to hold defendants liable under the allegations of this complaint. However, we shall propose and adopt a fourth basis for permitting the action to be tried, grounded upon an extension of the *Summers* doctrine.

I

Plaintiff places primary reliance upon cases which hold that if a party cannot identify which of two or more defendants caused an injury, the burden of proof may shift to the defendants to show that they were not responsible for the harm. This principle is sometimes referred to as the "alternative liability" theory.

The celebrated case of Summers v. Tice, supra, 33 Cal.2d 80, a unanimous opinion of this court, best exemplifies the rule. In *Summers*, the plaintiff was injured when two hunters negligently shot in his direction. It could not be determined which of them had fired the shot which actually caused the injury to the plaintiff's eye, but both defendants were nevertheless held jointly and severally liable for the whole of the damages. We reasoned that both were wrongdoers, both were negligent toward the plaintiff, and that it would be unfair to require plaintiff to isolate the defendant responsible, because if the one pointed out were to escape liability, the other might also, and the plaintiff-victim would be shorn of any remedy. In these circumstances, we held, the burden of proof shifted to the defendants, "each to absolve himself if he can." (*Id.*, p. 86.) We stated that under these or similar circumstances a defendant is ordinarily in a "far better position" to offer evidence to determine whether he or another defendant caused the injury.

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[9] The term "enterprise liability" is sometimes used broadly to mean that losses caused by an enterprise should be borne by it. (Klemme Enterprise Liability (1976) 47 Colo. L.Rev. 153, 158.)

In *Summers*, we relied upon Ybarra v. Spangard (1944) 25 Cal.2d 486. There, the plaintiff was injured while he was unconscious during the course of surgery. He sought damages against several doctors and a nurse who attended him while he was unconscious. We held that it would be unreasonable to require him to identify the particular defendant who had performed the alleged negligent act because he was unconscious at the time of the injury and the defendants exercised control over the instrumentalities which caused the harm. Therefore, under the doctrine of res ipsa loquitur, an inference of negligence arose that defendants were required to meet by explaining their conduct.[10]

The rule developed in *Summers* has been embodied in the Restatement of Torts. (Rest.2d Torts, § 433B, subsec. (3).)[11] Indeed, the *Summers* facts are used as an illustration (p. 447).

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[10] Other cases cited by plaintiff for the proposition stated in *Summers* are only peripherally relevant. For example, in Ray v. Alad Corporation (1977) 19 Cal.3d 22, the plaintiff brought an action in strict liability for personal injuries sustained when he fell from a defective ladder manufactured by the defendant's predecessor corporation. We held that, although under the general rule governing corporate succession the defendant could not be held responsible, nevertheless a "special departure" from that rule was justified in the particular circumstances. The defendant had succeeded to the good will of the manufacturer of the ladder, and it could obtain insurance against the risk of liability, whereas the plaintiff would be left without redress if he could not hold the defendant liable. The question whether one corporation should, for policy reasons, be answerable for the products manufactured by its predecessor is a different issue than that we describe above.

[11] Section 433B, subsection (3) of the Restatement provides: "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm." The reason underlying the rule is "the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct

(Footnote continued on following page)

Defendants assert that these principles are inapplicable here. First, they insist that a predicate to shifting the burden of proof under *Summers-Ybarra* is that the defendants must have greater access to information regarding the cause of the injuries than the plaintiff, whereas in the present case the reverse appears.

Plaintiff does not claim that defendants are in a better position than she to identify the manufacturer of the drug taken by her mother or, indeed, that they have the ability to do so at all, but argues, rather, that *Summers* does not impose such a requirement as a condition to the shifting of the burden of proof. In this respect we believe plaintiff is correct.

In *Summers*, the circumstances of the accident themselves precluded an explanation of its cause. To be sure, *Summers* states that defendants are "[o]rdinarily . . . in a far better position to offer evidence to determine which one caused the injury" than a plaintiff (33 Cal.2d 80, at p. 86), but the decision does not determine that this "ordinary" situation was present. Neither the facts nor the language of the opinion indicate that the two defendants, simultaneously shooting in the same direction, were in a better position than the plaintiff to ascertain whose shot caused the injury. As the opinion acknowledges, it was impossible for the trial court to determine whether the shot which entered the plaintiff's eye came from the gun of one defendant or the other. Nevertheless, burden of proof was shifted to the defendants.

Here, as in *Summers*, the circumstances of the injury appear to render identification of the manufacturer of the drug ingested by plaintiff's mother impossible by either plaintiff of defendants, and it cannot reasonably be said that one is in a better position than the other to make the identification. Because many years elapsed

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[11] *continued*
and the resulting harm has made it difficult or impossible to prove which of them has caused the harm." (Rest.2d Torts, § 433B, com. f, p. 446.)

between the time the drug was taken and the manifestation of plaintiff's injuries she, and many other daughters of mothers who took DES, are unable to make such identification.[12] Certainly there can be no implication that plaintiff is at fault in failing to do so—the event occurred while plaintiff was *in utero*, a generation ago.[13]

On the other hand, it cannot be said with assurance that defendants have the means to make the identification. In this connection, they point out that drug manufacturers ordinarily have no direct contact with the patients who take a drug prescribed by their doctors. Defendants sell to wholesalers, who in turn supply the product to physicians and pharmacies. Manufacturers do not maintain records of the persons who take the drugs they produce, and the selection of the medication is made by the physician rather than the manufacturer. Nor do we conclude that the absence of evidence on this subject is due to the fault of defendants. While it is alleged that they produce a defective product with delayed effects and without adequate warnings, the difficulty or impossibility of identification results primarily from the passage of time rather than from their allegedly negligent acts of failing to provide adequate warn-

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[12] The trial court was not required to determine whether plaintiff had made sufficient efforts to establish identification since it concluded that her failure to do so was fatal to her claim. The court accepted at face value plaintiff's assertion that she could not make the identification, and for purposes of this appeal we make the same assumption.

[13] Defendants maintain that plaintiff is in a better position than they are to identify the manufacturer because her mother might recall the name of the prescribing physician or the hospital or pharmacy where the drug originated, and might know the brand and strength of dosage, the appearance of the medication, or other details from which the manufacturer might be identified, whereas they possess none of this information. As we point out in footnote 12, we assume for purposes of this appeal that plaintiff cannot point to any particular manufacturer as the producer of the DES taken by her mother.

ings. Thus Haft v. Lone Palm Hotel (1970) 3 Cal.3d 756, upon which plaintiff relies, is distinguishable.[14]

It is important to observe, however, that while defendants do not have means superior to plaintiff to identify the maker of the precise drug taken by her mother, they may in some instances be able to prove that they did not manufacture the injury-causing substance. In the present case, for example, one of the original defendants was dismissed from the action upon proof that it did not manufacture DES until after plaintiff was born.

Thus we conclude that the fact defendants do not have greater access to information which might establish the identity of the manufacturer of the DES which injured plaintiff does not per se prevent application of the *Summers* rule.

Nevertheless, plaintiff may not prevail in her claim that the *Summers* rationale should be employed to fix the whole liability for her injuries upon defendants, at

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[14] In *Haft*, a father and his young son drowned in defendants' swimming pool. There were no witnesses to the accident. Defendants were negligent in failing to provide a lifeguard, as required by law. We held that the absence of evidence of causation was a direct and foreseeable result of the defendants' negligence, and that, therefore, the burden of proof on the issue of causation was upon defendants. Plaintiff attempts to bring herself within this holding. She asserts that defendants' failure to discover or warn of the dangers of DES and to label the drug as experimental caused her mother to fail to keep records or remember the brand name of the drug prescribed to her "since she was unaware of any reason to do so for a period of 10 to 20 years." There is no proper analogy to *Haft* here. While in *Haft* the presence of a lifeguard on the scene would have provided a witness to the accident and probably prevented it, plaintiff asks us to speculate that if the DES taken by her mother had been labelled as an experimental drug, she would have recalled or recorded the name of the manufacturer and passed this information on to her daughter. It cannot be said here that the absence of evidence of causation was a "direct and foreseeable result" of defendants' failure to provide a warning label.

least as those principles have previously been applied.[15] There is an important difference between the situation involved in *Summers* and the present case. There, all the parties who were or could have been responsible for the harm to the plaintiff were joined as defendants. Here, by contrast, there are approximately 200 drug companies which made DES, any of which might have manufactured the injury-producing drug.[16]

Defendants maintain that, while in *Summers* there was a 50 percent chance that one of the two defendants was responsible for the plaintiff's injuries, here since any one of 200 companies which manufactured DES might have made the product which harmed plaintiff, there is no rational basis upon which to infer that any

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[15] Plaintiff relies upon three older cases for the proposition that the burden of proof may be shifted to defendants to explain the cause of an accident even if less than all of them are before the court. (Benson v. Ross (Mich. 1906) 106 N.W. 1120; Moore v. Foster (Miss. 1938) 180 So. 73; Oliver v. Miles (Miss. 1927) 110 So. 666.) These cases do not relate to the shifting of the burden of proof; rather, they imposed liability upon one of two or more joint tortfeasors on the ground that they acted in concert in committing a negligent act. This theory of concerted action as a basis for defendants' liability will be discussed *infra*. In *Summers*, we stated that these cases were "straining" the concept of concerted action and that the "more reasonable" basis for holding defendants jointly liable when more than one of them had committed a tort and plaintiff could not establish the identity of the party who had caused the damage was the danger that otherwise two negligent parties might be exonerated. (*Summers*, 33 Cal.2d 80, at pp. 84-85.)

[16] According to the Restatement, the burden of proof shifts to the defendants only if the plaintiff can demonstrate that all defendants acted tortiously and that the harm resulted from the conduct of one of them. (Rest.2d Torts, § 433B, com. g, p. 446.) It goes on to state that the rule thus far has been applied only where all the actors involved are joined as defendants and where the conduct of all is simultaneous in time, but cases might arise in which some modification of the rule would be necessary if one of the actors is or cannot be joined, or because of the effects of lapse of time, or other circumstances. (*Id.*, com. h, p. 446.)

defendant in this action caused plaintiff's injuries, nor even a reasonable possibility that they were responsible.[17]

These arguments are persuasive if we measure the chance that any one of the defendants supplied the injury-causing drug by the number of possible tortfeasors. In such a context, the possibility that any of the five defendants supplied the DES to plaintiff's mother is so remote that it would be unfair to require each defendant to exonerate itself. There may be a substantial likelihood that none of the five defendants joined in the action made the DES which caused the injury, and that the offending producer not named would escape liability altogether. While we propose, *infra*, an adaptation of the rule in *Summers* which will substantially overcome these difficulties, defendants appear to be correct that the rule, as previously applied, cannot relieve plaintiff of the burden of proving the identity of the manufacturer which made the drug causing her injuries.[18]

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[17] Defendants claim further that the effect of shifting the burden of proof to them to demonstrate that they did not manufacture the DES which caused the injury would create a rebuttable presumption that one of them made the drug taken by plaintiff's mother, and that this presumption would deny them due process because there is no rational basis for the inference.

[18] Garcia v. Joseph Vince Co., supra, 84 Cal.App.3d 868, relied upon by defendants, presents a distinguishable factual situation. The plaintiff in *Garcia* was injured by a defective saber. He was unable to identify which of two manufacturers had produced the weapon because it was commingled with other sabers after the accident. In a suit against both manufacturers, the court refused to apply the *Summers* rationale on the ground that the plaintiff had not shown that either defendant had violated a duty to him. Thus in *Garcia*, only one of the two defendants was alleged to have manufactured a defective product, and the plaintiff's inability to identify which of the two was negligent resulted in a judgment for both defendants. (See also Wetzel v. Eaton, supra, 62 F.R.D. 22.) Here, by contrast, the DES manufactured by all defendants is alleged to be defective, but plaintiff is unable to demonstrate which of the defendants supplied the precise DES which caused her injuries.

II

The second principle upon which plaintiff relies is the so-called "concert of action" theory. Preliminarily, we briefly describe the procedure a drug manufacturer must follow before placing a drug on the market. Under federal law as it read prior to 1962, a new drug was defined as one "not generally recognized as . . . safe." (§ 102, 76 Stat. 781 (Oct. 10, 1962).) Such a substance could be marketed only if a new drug application had been filed with the Food and Drug Administration and had become "effective."[19] If the agency determined that a product was no longer a "new drug," i.e., that it was "generally recognized as . . . safe." (21 U.S.C.A. § 321, subd. (p) (1)) it could be manufactured by any drug company without submitting an application to the agency. According to defendants, 123 new drug applications for DES had been approved by 1952, and in that year DES was declared not to be a "new drug," thus allowing any manufacturer to produce it without prior testing and without submitting a new drug application to the Food and Drug Administration.

With this background we consider whether the complaint states a claim based upon "concert of action" among defendants. The elements of this doctrine are prescribed in section 876 of the Restatement of Torts. The section provides, "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement

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[19] A new drug application became "effective" automatically if the Secretary of Health, Education and Welfare failed within a certain period of time to disapprove the application. If the agency had insufficient information to decide whether the drug was safe or had information that it was unsafe, the application was denied. (§ 505,52 Stat. 1052 (June 25, 1938).) Since 1962, affirmative approval of an application has been required before a new drug may be marketed. (21 U.S.C.A. § 355, subd. (c).)

to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." With respect to this doctrine, Prosser states that "those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him. [¶] Express agreement is not necessary, and all that is required is that there be a tacit understanding . . . ." (Prosser, Law of Torts (4th ed. 1971), sec. 46, p. 292.)

Plaintiff contends that her complaint states a cause of action under these principles. She alleges that defendants' wrongful conduct "is the result of planned and concerted action, express and implied agreements, collaboration in, reliance upon, acquiescence in and ratification, exploitation and adoption of each other's testing, marketing methods, lack of warnings . . . and other acts or omissions . . ." and that "acting individually and in concert, [defendants] promoted, approved, authorized, acquiesced in, and reaped profits from sales" of DES. These allegations, plaintiff claims, state a "tacit understanding" among defendants to commit a tortious act against her.

In our view, this litany of charges is insufficient to allege a cause of action under the rules stated above. The gravamen of the charge of concert is that defendants failed to adequately test the drug or to give sufficient warning of its dangers and that they relied upon the tests performed by one another and took advantage of each others' promotional and marketing techniques. These allegations do not amount to a charge that there was a tacit understanding or a common plan among defendants to fail to conduct adequate tests or give sufficient warnings, and that they substantially aided and encouraged one another in these omissions.

The complaint charges also that defendants produced DES from a "common and mutually agreed upon formula," allowing pharmacists to treat the drug as a

"fungible commodity" and to fill prescriptions from whatever brand of DES they had on hand at the time. It is difficult to understand how these allegations can form the basis of a cause of action for wrongful conduct by defendants, acting in concert. The formula for DES is a scientific constant. It is set forth in the United States Pharmacopoeia, and any manufacturer producing that drug must, with exceptions not relevant here, utilize the formula set forth in that compendium. (21 U.S.C.A. § 351, subd. (b).)

What the complaint appears to charge is defendants' parallel or imitative conduct in that they relied upon each others' testing and promotion methods. But such conduct describes a common practice in industry: a producer avails himself of the experience and methods of others making the same or similar products. Application of the concept of concert of action to this situation would expand the doctrine far beyond its intended scope and would render virtually any manufacturer liable for the defective products of an entire industry, even if it could be demonstrated that the product which caused the injury was not made by the defendant.

None of the cases cited by plaintiff supports a conclusion that defendants may be held liable for concerted tortious acts. They involve conduct by a small number of individuals whose actions resulted in a tort against a single plaintiff, usually over a short span of time, and the defendant held liable was either a direct participant in the acts which caused damage,[20] or encouraged and

[20] Weinberg Co. v. Bixby (1921) 185 Cal. 87, 103, involved a husband who was held liable with his wife for wrongful diversion of flood waters although he had given his wife title to the land upon which the outlet causing the diversion was constructed. He not only owned land affected by the flood waters, but he was his wife's agent for the purpose of reopening the outlet which caused the damage. In Meyer v. Thomas (1936) 18 Cal.App.2d 299, 305-306, both defendants participated in the conversion of a note and deed of trust.

assisted the person who directly caused the injuries by participating in a joint activity.[21]

Orser v. George (1967) 252 Cal.App.2d 660, upon which plaintiff primarily relies, is also distinguishable. There, three hunters negligently shot at a mudhen in decedent's direction. Two of them shot alternately with the gun which released the bullet resulting in the fatal wound, and the third, using a different gun, fired alternately at the same target, shooting in the same line of fire, perhaps acting tortiously. It was held that there was a possibility the third hunter knew the conduct of the others was tortious toward the decedent and gave them substantial assistance and encouragement, and that it was also possible his conduct, separately considered, was a breach of duty toward decedent. Thus, the granting of summary judgment was reversed as to the third hunter.

The situation in *Orser* is similar to Agovino v. Kunze, supra, 181 Cal.App.2d 591, in which liability was imposed upon a participant in a drag race, rather than to the facts alleged in the present case. There is no allegation here that each defendant knew the other defendants' conduct was tortious toward plaintiff, and that they assisted and encouraged one another to inadequately test DES and to provide inadequate warnings. Indeed, it seems dubious whether liability on the concert of action theory can be predicated upon substantial assistance and encouragement given by one alleged tortfeasor to another pursuant to a tacit understanding to fail to perform an act. Thus, there was no concert of action among defendants within the meaning of that doctrine.

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[21] In Agovino v. Kunze (1960) 181 Cal.App.2d 591, 599, a participant in a drag race was held liable for injuries to a plaintiff who collided with the car of another racer. In Loeb v. Kimmerle (1932) 215 Cal. 143, 151, a defendant who encouraged another defendant to commit an assault was held jointly liable for the plaintiff's injuries. Also see Weirum v. RKO General, Inc. (1975) 15 Cal.3d 40.

III

A third theory upon which plaintiff relies is the concept of industry-wide liability, or according to the terminology of the parties, "enterprise liability." This theory was suggested in Hall v. E. I. Du Pont de Nemours & Co., Inc. (E.D.N.Y. 1972) 345 F.Supp. 353. In that case, plaintiffs were 13 children injured by the explosion of blasting caps in 12 separate incidents which occurred in 10 different states between 1955 and 1959. The defendants were six blasting cap manufacturers, comprising virtually the entire blasting cap industry in the United States, and their trade association. There were, however, a number of Canadian blasting cap manufacturers which could have supplied the caps. The gravamen of the complaint was that the practice of the industry of omitting a warning on individual blasting caps and of failing to take other safety measures created an unreasonable risk of harm, resulting in the plaintiffs' injuries. The complaint did not identify a particular manufacturer of a cap which caused a particular injury.[22]

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[22] We deliberately employ the term "suggested" to describe the effect of the *Hall* opinion because of the uncertain posture of the decision as authority. The defendants moved to dismiss the action on the ground that the plaintiffs had not stated a claim, and they also sought to sever the claims of the various plaintiffs and transfer them to the district court in the place where each accident occurred. The opinion discusses various possible bases of liability, including industry-wide liability, upon the assumption that there existed a national body of state tort law. (345 F.Supp. at p. 360.) At the conclusion of its opinion, the court called for briefs on the choice-of-law issues involved in the case. In a subsequent opinion, the same court decided, after briefs had been filed on the choice-of-law question, that the plaintiffs' claims should be severed, and it transferred each one to the federal court sitting in the district where the accident occurred. (Chance v. E. I. Du Pont de Nemours & Co., Inc. (E.D.N.Y. 1974) 371 F.Supp. 439.) Thereafter, the transferred cases resulted in judgments for defendants upon various grounds unrelated to the theory of industry-wide liability. (Lehtonen v. E. I. Du Pont de Nemours & Co., Inc. (D. Mont. 1975) 389 F.Supp. 633 [failure

(Footnote continued on following page)

The court reasoned as follows: there was evidence that defendants, acting independently, had adhered to an industry-wide standard with regard to the safety features of blasting caps, that they had in effect delegated some functions of safety investigation and design, such as labelling, to their trade association, and that there was industry-wide cooperation in the manufacture and design of blasting caps. In these circumstances, the evidence supported a conclusion that all the defendants jointly controlled the risk. Thus, if plaintiffs could establish by a preponderance of the evidence that the caps were manufactured by one of the defendants, the burden of proof as to causation would shift to all the defendants. The court noted that this theory of liability applied to industries composed of a small number of units, and that what would be fair and reasonable with regard to an industry of five or ten producers might be manifestly unreasonable if applied to a decentralized industry composed of countless small producers.[23]

Plaintiff attempts to state a cause of action under the rationale of *Hall.* She alleges joint enterprise and collaboration among defendants in the production, marketing, promotion and testing of DES, and "concerted promulgation and adherence to industry-wide testing, safety, warning and efficacy standards" for the drug. We have concluded above that allegations that

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[22] *continued*
to amend complaint within 30 days]; Davis v. E. I. Du Pont de Nemours & Co., Inc. (W.D.N.C. 1974) 400 F.Supp. 1347 [statute of limitations]; Ball v. E. I. Du Pont De Nemours & Co., Inc. (6th Cir. 1975) 519 F.2d 715 [jury verdict in favor of defendant after plaintiff identified the manufacturer of the blasting cap which caused his injuries].) The parties have not indicated the status of the remaining cases transferred.

[23] In discussing strict liability, the *Hall* court mentioned the drug industry, stating, "In cases where manufacturers have more experience, more information, and more control over the risky properties of their products than do drug manufacturers, courts have applied a broader concept of foreseeability which approaches the enterprise liability rationale." (345 F.Supp. 353 at p. 370.)

defendants relied upon one another's testing and promotion methods do not state a cause of action for concerted conduct to commit a tortious act. Under the theory of industry-wide liability, however, each manufacturer could be liable for all injuries caused by DES by virtue of adherence to an industry-wide standard of safety.

In the Fordham Comment, the industry-wide theory of liability is discussed and refined in the context of its applicability to actions alleging injuries resulting from DES. The author explains causation under that theory as follows, ". . . [T]he industrywide standard becomes itself the cause of plaintiff's injury, just as defendants' joint plan is the cause of injury in the traditional concert of action plea. Each defendant's adherence perpetuates this standard, which results in the manufacture of the particular, unidentifiable injury-producing product. Therefore, each industry member has contributed to plaintiff's injury." (Fordham Comment, supra, at p. 977.)

The Comment proposes seven requirements for a cause of action based upon industry-wide liability,[24] and suggests that if a plaintiff proves these elements, the burden of proof of causation should be shifted to the defendants, who may exonerate themselves only by

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[24] The suggested requirements are as follows:

1. There existed an insufficient, industry-wide standard of safety as to the manufacture of the product.

2. Plaintiff is not at fault for the absence of evidence identifying the causative agent but, rather, this absence of proof is due to defendant's conduct.

3. A generically similar defective product was manufactured by all the defendants.

4. Plaintiff's injury was caused by this defect.

5. Defendants owed a duty to the class of which plaintiff was a member.

6. There is clear and convincing evidence that plaintiff's injury was caused by a product made by one of the defendants. For example, the joined defendants accounted for a high percentage of such defective products on the market at the time of plaintiff's injury.

7. All defendants were tortfeasors.

showing that their product could not have caused the injury.[25]

We decline to apply this theory in the present case. At least 200 manufacturers produced DES; *Hall*, which involved 6 manufacturers representing the entire blasting cap industry in the United States, cautioned against application of the doctrine espoused therein to a large number of producers. (345 F.Supp. at p. 378.) Moreover, in *Hall*, the conclusion that the defendants jointly controlled the risk was based upon allegations that they had delegated some functions relating to safety to a trade association. There are no such allegations here, and we have concluded above that plaintiff has failed to allege liability on a concert of action theory.

Equally important, the drug industry is closely regulated by the Food and Drug Administration, which actively controls the testing and manufacture of drugs and the method by which they are marketed, including the contents of warning labels.[26] To a considerable degree, therefore, the standards followed by drug manufacturers are suggested or compelled by the government. Adherence to those standards cannot, of course, absolve a manufacturer of liability to which it would otherwise be subject. (Stevens v. Parke, Davis &

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[25] The Fordham Comment takes exception to one aspect of the theory of industry-wide liability as set forth in *Hall*, i.e., the conclusion that a plaintiff is only required to show by a preponderance of the evidence that one of the defendants manufactured the product which caused her injury. The Comment suggests that a plaintiff be required to prove by clear and convincing evidence that one of the defendants before the court was responsible and that this standard of proof would require that the plaintiff join in the action the producers of 75 or 80 percent of the DES prescribed for prevention of miscarriage. It is also suggested that the damages be apportioned among the defendants according to their share of the market for DES. (Fordham Comment, supra, 999-1000.)

[26] Federal regulations may specify the type of tests a manufacturer must perform for certain drugs (21 C.F.R. § 436.206 et seq.), the type of packaging used (§ 429.10), the warnings which appear on labels (§ 369.20), and the standards to be followed in the manufacture of a drug (§ 211.22 et seq.).

Co. (1973) 9 Cal.3d 51, 65.) But since the government plays such a pervasive role in formulating the criteria for the testing and marketing of drugs, it would be unfair to impose upon a manufacturer liability for injuries resulting from the use of a drug which it did not supply simply because it followed the standards of the industry.[27]

IV

If we were confined to the theories of *Summers* and *Hall*, we would be constrained to hold that the judgment must be sustained. Should we require that plaintiff identify the manufacturer which supplied the DES used by her mother or that all DES manufacturers be joined in the action, she would effectively be precluded from any recovery. As defendants candidly admit, there is little likelihood that all the manufacturers who made DES at the time in question are still in business or that they are subject to the jurisdiction of the California courts. There are, however, forceful arguments in favor of holding that plaintiff has a cause of action.

In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs. Just as Justice Traynor in his landmark concurring opinion in Escola v. Coca Cola Bottling Company (1944) 24 Cal.2d 453, 467-468, recognized that in an era of mass production and complex marketing methods the traditional standard of negligence was insufficient to govern the obligations of manufacturer to consumer, so should we

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[27] Abel v. Eli Lilly and Company, the Michigan case referred to above which held that the plaintiffs had stated a cause of action against several manufacturers of DES even though they could not identify a particular manufacturer as the source of a particular injury (see fn. 7, *ante*), relied upon the theories of concerted action and alternative liability.

acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances. The Restatement comments that modification of the *Summers* rule may be necessary in a situation like that before us. (See fn. 16, *ante*.)

The most persuasive reason for finding plaintiff states a cause of action is that advanced in *Summers*: as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury. Here, as in *Summers*, plaintiff is not at fault in failing to provide evidence of causation, and although the absence of such evidence is not attributable to the defendants either, their conduct in marketing a drug the effects of which are delayed for many years played a significant role in creating the unavailability of proof.

From a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product. As was said by Justice Traynor in *Escola*, "[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." (24 Cal.2d p. 462; see also Rest.2d Torts, § 402A, com. c, pp. 349-350.) The manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety. (Cronin v. J.B.E. Olson Corp. (1972) 8 Cal.3d 121, 129; Beech Aircraft Corp. v. Superior Court (1976) 61 Cal.App.3d 501, 522-523.) These considerations are particularly significant where medication is involved, for the consumer is virtually helpless to protect himself from serious, sometimes permanent, sometimes fatal, injuries caused by deleterious drugs.

Where, as here, all defendants produced a drug from an identical formula and the manufacturer of the DES which caused plaintiff's injuries cannot be identified through no fault of plaintiff, a modification of the rule of *Summers* is warranted. As we have seen, an undiluted

Summers rationale is inappropriate to shift the burden of proof of causation to defendants because if we measure the chance that any particular manufacturer supplied the injury-causing product by the number of producers of DES, there is a possibility that none of the five defendants in this case produced the offending substance and that the responsible manufacturer, not named in the action, will escape liability.

But we approach the issue of causation from a different perspective: we hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose. Plaintiff asserts in her briefs that Eli Lilly and Company and 5 or 6 other companies produced 90 percent of the DES marketed. If at trial this is established to be the fact, then there is a corresponding likelihood that this comparative handful of producers manufactured the DES which caused plaintiff's injuries, and only a 10 percent likelihood that the offending producer would escape liability.[28]

If plaintiff joins in the action the manufacturers of a substantial share of the DES which her mother might have taken, the injustice of shifting the burden of proof to defendants to demonstrate that they could not have made the substance which injured plaintiff is

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[28] The Fordham Comment explains the connection between percentage of market share and liability as follows: "[I]f X Manufacturer sold one-fifth of all the DES prescribed for pregnancy and identification could be made in all cases, X would be the sole defendant in approximately one-fifth of all cases and liable for all the damages in those cases. Under alternative liability, X would be joined in all cases in which identification could not be made, but liable for only one-fifth of the total damages in these cases. X would pay the same amount either way. Although the correlation is not, in practice, perfect [footnote omitted], it is close enough so that defendants' objections on the ground of fairness lose their value." (Fordham Comment, supra, at p. 94.)

significantly diminished. While 75 to 80 percent of the market is suggested as the requirement by the Fordham Comment (at p. 996), we hold only that a substantial percentage is required.

The presence in the action of a substantial share of the appropriate market also provides a ready means to apportion damages among the defendants. Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries. In the present case, as we have seen, one DES manufacturer was dismissed from the action upon filing a declaration that it had not manufactured DES until after plaintiff was born. Once plaintiff has met her burden of joining the required defendants, they in turn may cross-complain against other DES manufacturers, not joined in the action, which they can allege might have supplied the injury-causing product.

Under this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products. Some minor discrepancy in the correlation between market share and liability is inevitable; therefore, a defendant may be held liable for a somewhat different percentage of the damage than its share of the appropriate market would justify. It is probably impossible, with the passage of time, to determine market share with mathematical exactitude. But just as a jury cannot be expected to determine the precise relationship between fault and liability in applying the doctrine of comparative fault (Li v. Yellow Cab Co. (1975) 13 Cal.3d 804) or partial indemnity (American Motorcycle Assn. v. Superior Court (1978) 20 Cal.3d 578), the difficulty of apportioning damages among the defendant producers in exact relation to their market share does not seriously militate against the rule we adopt. As we said in *Summers* with regard to the liability of independent tortfeasors, where a correct division of liability cannot be made "the trier of fact may make it the best it can." (33 Cal.2d at p. 88.)

We are not mindful of the practical problems involved in defining the market and determining market share,[29] but these are largely matters of proof which properly cannot be determined at the pleading stage of these proceedings. Defendants urge that it would be both unfair and contrary to public policy to hold them liable for plaintiff's injuries in the absence of proof that one of them supplied the drug responsible for the damage. Most of their arguments, however, are based upon the assumption that one manufacturer would be held responsible for the products of another or for those of all other manufacturers if plaintiff ultimately prevails. But under the rule we adopt, each manufacturer's liability for an injury would be approximately equivalent to the damages caused by the DES it manufactured.[30]

The judgments are reversed.

MOSK, J.

WE CONCUR:

BIRD, C.J.
NEWMAN, J.
*WHITE, J.

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[29] Defendants assert that there are no figures available to determine market share, that DES was provided for a number of uses other than to prevent miscarriage and it would be difficult to ascertain what proportion of the drug was used as a miscarriage preventative, and that the establishment of a time frame and area for market share would pose problems.

[30] The dissent concludes by implying the problem will disappear if the Legislature appropriates funds "for the education, identification, and screening of persons exposed to DES." While such a measure may arguably he helpful in the abstract, it does not address the issue involved here: damages for injuries which have been or will be suffered. Nor, as a principle, do we see any justification for shifting the financial burden for such damages from drug manufacturers to the taxpayers of California.

* Assigned by the Chairman of the Judicial Council.

SINDELL v. ABBOTT LABORATORIES
ROGERS v. REXALL DRUG CO.
L.A. 31063

DISSENTING OPINION BY RICHARDSON, J.

I respectfully dissent. In these consolidated cases the majority adopts a wholly new theory which contains these ingredients: The plaintiffs were not alive at the time of the commission of the tortious acts. They sue a generation later. They are permitted to receive substantial damages from multiple defendants without any proof that any defendant caused or even probably caused plaintiffs' injuries.

Although the majority purports to change only the required burden of proof by shifting it from plaintiffs to defendants, the effect of its holding is to guarantee that plaintiffs will prevail on the causation issue because defendants are no more capable of disproving factual causation than plaintiffs are of proving it. "Market share" liability thus represents a new high water mark in tort law. The ramifications seem almost limitless, a fact which prompted one recent commentator, in criticizing a substantially identical theory, to conclude that "Elimination of the burden of proof as to identification [of the manufacturer whose drug injured plaintiff] would impose a liability which would exceed absolute liability." (Coggins, *Industry-Wide Liability* (1979) 13 Suffolk L.Rev. 980, 998, fn. omitted; see also, pp. 1000-1001.) In my view, the majority's departure from traditional tort doctrine is unwise.

The applicable principles of causation are very well established. A leading torts scholar, Dean Prosser, has authoritatively put it this way: "An *essential* element of the plaintiff's cause of action for negligence, *or for that matter for any other tort*, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." (Prosser, Torts (4th ed. 1971) § 41, p. 236, italics added.) With particular reference to the matter before us, and in the context of products liability, the require-

ment of a causation element has been recognized as equally fundamental. "It is clear that any holding that a producer, manufacturer, seller, or a person in a similar position, is liable for injury caused by a particular product, must necessarily be predicated upon proof that the product in question was one for whose condition the defendant was in some way responsible. Thus, for example, if recovery is sought from a manufacturer, *it must be shown that he actually was the manufacturer of the product which caused the injury*; . . ." (1 Hursh & Bailey, American Law of Products Liability (2d ed. 1974) § 1:41, p. 125, italics added; accord, *Prosser*, supra, § 103, at pp. 671-672; 2 Dooley Modern Tort Law (1977) § 32.03, p. 243.) Indeed, an inability to prove this causal link between defendant's conduct and plaintiff's injury has proven fatal in prior cases brought against manufacturers of DES by persons who were situated in positions identical to those of plaintiffs herein. (See McCreery v. Eli Lilly & Co. (1978) 87 Cal.App.3d 77, 82; Gray v. United States (D.Tex. 1978) 445 F.Supp. 337, 338.)

The majority now expressly abandons the foregoing traditional requirement of some causal connection between defendants' acts and plaintiffs' injury in the creation of its new modified industry-wide tort. Conceptually, the doctrine of absolute liability which heretofore in negligence law has substituted only for the requirement of a breach of defendant's duty of care, under the majority's hand now subsumes the additional necessity of a causal relationship.

According to the majority, in the present case plaintiffs have openly conceded that they are unable to identify the particular entity which manufactured the drug consumed by their mothers. In fact, plaintiffs have joined only *five* of the approximately *two hundred* drug companies which manufactured DES. Thus, the case constitutes far more than a mere factual variant upon the theme composed in Summers v. Tice (1948) 33 Cal.2d 80, wherein plaintiff joined as codefendants the *only* two persons who could have injured him. As the majority must acknowledge, our *Summers* rule applies only to cases in which ". . . it is proved that harm has been

caused to the plaintiff by . . . one of [the named defendants], but there is uncertainty as to which one has caused it, . . ." (Rest.2d Torts, § 433B, subd. (3).) In the present case, in stark contrast, it remains wholly speculative and conjectural whether *any* of the five named defendants actually caused plaintiffs' injuries.

The fact that plaintiffs cannot tie defendants to the injury-producing drug does not trouble the majority for it declares that the *Summers* requirement of proof of actual causation by a named defendant is satisfied by a joinder of those defendants who have *together* manufactured "*a substantial percentage*" of the DES which has been marketed. Notably lacking from the majority's expression of its new rule, unfortunately, is any definition or guidance as to what should constitute a "substantial" share of the relevant market. The issue is entirely open-ended and the answer, presumably, is anyone's guess.

Much more significant, however, is the consequence of this unprecedented extension of liability. Recovery is permitted from a handful of defendants *each* of whom *individually* may account for a comparatively small share of the relevant market, so long as the *aggregate* business of those who have been sued is deemed "substantial." In other words, a particular defendant may be held proportionately liable *even though mathematically it is much more likely than not that it played no role whatever in causing plaintiffs' injuries.* Plaintiffs have strikingly capsulated their reasoning by insisting ". . . that while one manufacturer's product may not have injured a particular plaintiff, we can assume that it injured a different plaintiff and all we are talking about is a mere matching of plaintiffs and defendants." (Counsel's letter (Oct. 16, 1979) p. 3.) In adopting the foregoing rationale the majority rejects over 100 years of tort law which required that before tort liability was imposed a "matching" of defendant's conduct and plaintiff's injury was absolutely essential. Furthermore, in bestowing on plaintiffs this new largess the majority sprinkles the rain of liability upon all the joined defendants alike—those who may be tortfeasors and those who may have had nothing at all to do with

plaintiffs' injury—and an added bonus is conferred. Plaintiffs are free to pick and choose their targets.

The "market share" thesis may be paraphrased. Plaintiffs have been hurt by *someone* who made DES. Because of the lapse of time no one can prove who made it. Perhaps it was not the named defendants who made it, but they did make some. Although DES was apparently safe at the time it was used, it was subsequently proven unsafe as to some daughters of some users. Plaintiffs have suffered injury and defendants are wealthy. There should be a remedy. Strict products liability is unavailable because the element of causation is lacking. Strike that requirement and label what remains "alternative" liability, "industry-wide" liability, or "market share" liability, proving thereby that if you hit the square peg hard and often enough the round holes will really become square, although you may splinter the board in the process.

The foregoing result is directly contrary to long established tort principles. Once again, in the words of Dean Prosser, the applicable rule is: "[Plaintiff] must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. *A mere possibility of such causation is not enough*; and when the matter remains one of pure speculation or conjecture, or the probabilities are at very best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." (*Prosser*, supra, § 41, at p. 241, italics added, fns. omitted.) Under the majority's new reasoning, however, a defendant is fair game if it happens to be engaged in a similar business and causation is *possible*, even though remote.

In passing, I note the majority's dubious use of market share data. It is perfectly proper to use such information to assist in proving, circumstantially, that a particular defendant probably caused plaintiffs' injuries. Circumstantial evidence may be used as a basis for proving the requisite probable causation. (*Id.*, at p. 242.) The majority, however, authorizes the use of such evidence for

an entirely different purpose, namely, to impose and allocate liability among multiple defendants only one of whom *may* have produced the drug which injured plaintiffs. Because this use of market share evidence does not implicate *any* particular defendant, I believe such data are entirely irrelevant and inadmissible, and that the majority errs in such use. In the absence of some statutory authority there is no legal basis for such use.

Although seeming to acknowledge that imposition of liability upon defendants who probably did not cause plaintiffs' injuries is unfair, the majority justifies this inequity on the ground that "each manufacturer's liability for an injury would be approximately equivalent to the damages caused by the DES it manufactured." (*Ante*, p. ..... [maj. opn., at p. 35].) In other words, because each defendant's liability is proportionate to its market share, supposedly "each manufacturer's liability would approximate its responsibility for the injuries caused by his own products." (*Ante*, p. ..... [maj. opn., at p. 33].) The majority dodges the "practical problems" thereby presented, choosing to describe them as "matters of proof." However, the difficulties, in my view, are not so easily ducked, for they relate not to evidentiary matters but to the fundamental question of liability itself.

Additionally, it is readily apparent that "market share" liability will fall unevenly and disproportionately upon those manufacturers who are amenable to suit in California. On the assumption that no other state will adopt so radical a departure from traditional tort principles, it may be concluded that under the majority's reasoning those defendants who are brought to trial in this state will bear effective joint responsibility for 100 percent of plaintiffs' injuries despite the fact that their "substantial" aggregate market share may be considerably less. This undeniable fact forces the majority to concede that, "a defendant may be held liable for a somewhat different percentage of the damage than its share of the appropriate market would justify." (*Ante*, p. ..... [maj. opn., at p. 33].) With due deference, I suggest that the complete unfairness of such a result in a case involving only five of two hundred manufacturers is readily manifest.

Furthermore, several other important policy considerations persuade me that the majority holding is both inequitable and improper. The injustice inherent in the majority's new theory of liability is compounded by the fact that plaintiffs who use it are treated far more favorably than are the plaintiffs in routine tort actions. In most tort cases plaintiff knows the identity of the person who has caused his injuries. In such a case, plaintiff, of course, has no option to seek recovery from an entire industry or a "substantial" segment thereof, but in the usual instance can recover, if at all, only from the particular defendant causing injury. Such a defendant may or may not be either solvent or amenable to process. Plaintiff in the ordinary tort case must take a chance that defendant can be reached and can respond financially. On what principle should those plaintiffs who wholly fail to prove any causation, an essential element of the traditional tort cause of action, be rewarded by being offered both a wider selection of potential defendants and a greater opportunity for recovery?

The majority attempts to justify its new liability on the ground that defendants herein are "better able to bear the cost of injury resulting from the manufacture of a defective product." (*Ante*, p. ..... [maj. opn., at p. 30].) This "deep pocket" theory of liability, fastening liability on defendants presumably because they are rich, has understandable popular appeal and might be tolerable in a case disclosing substantially stronger evidence of causation than herein appears. But as a general proposition, a defendant's wealth is an unreliable indicator of fault, and should play no part, at least consciously, in the legal analysis of the problem. In the absence of proof that a particular defendant caused or at least probably caused plaintiff's injuries, a defendant's ability to bear the cost thereof is no more pertinent to the underlying issue of liability than its "substantial" share of the relevant market. A system priding itself on "*equal* justice under law" does not flower when the *liability* as well as the *damage* aspect of a tort action is determined by a defendant's wealth. The inevitable consequence of such a result is to create and perpetuate two rules of law—one applicable to wealthy

defendants, and another standard pertaining to defendants who are poor or who have modest means. Moreover, considerable doubts have been expressed regarding the ability of the drug industry, and especially its smaller members, to bear the substantial economic costs (from both damage awards and high insurance premiums) inherent in imposing an industry-wide liability. (See Coggins, supra, 13 Suffolk L.Rev. at pp. 1003-1006, 1010-1011.)

An important and substantial countervailing public policy in defendants' favor was very recently expressed in a similar DES case, McCreery v. Eli Lilly & Co., supra, 87 Cal.App.3d 77, 86-87. Although the majority herein impliedly rejects the appellate court's holding, in my opinion pertinent language of the *McCreery* court, based upon the Restatement of Torts and bearing on the majority's "market share" theory, is well worth repeating: "Application of the comments to the Restatement Second of Torts, section 402A, to this situation compels a rejection of the imposition of liability. As the comment states, '. . . It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again, with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.' (Rest.2d Torts, § 402A, com. k.) *This section implicitly recognizes the social policy behind the development of new pharmaceutical preparations.* As one commentator states, '[t]he social and economic benefits from mobilizing the industry's resources in the war against disease and in reducing the costs of medical care are potentially enormous. The development of new drugs in the last three decades has already resulted in great

social benefits. The potential gains from further advances remain large. To risk such gains is unwise. Our major objective should be to encourage a continued high level of industry investment in pharmaceutical R & D [research and development].' (Schwartzman, The Expected Return from Pharmaceutical Research; Sources of New Drugs and the Profitability of R & D Investment (1975) p. 54.)" (McCreery v. Eli Lilly & Co., supra, 87 Cal.App.3d 77, 86-87, italics added; see also Coggins, supra, 13 Suffolk L.Rev. at p. 1004.)

In the present case the majority imposes liability more than 20 years after ingestion of drugs which at the time they were used, after careful testing, had the full approval of the United States Food and Drug Administration. It seems to me that liability in the manner created by the majority must inevitably inhibit, if not the research or development, at least the dissemination of new pharmaceutical drugs. Such a result, as explained by the Restatement, is wholly inconsistent with traditional tort theory.

I also suggest that imposition of so sweeping a liability may well prove to be extremely shortsighted from the standpoint of broad social policy. Who is to say whether, and at what time and in what form, the drug industry upon which the majority now fastens this blanket liability, may develop a miracle drug critical to the diagnosis, treatment, or, indeed, cure of the very disease in question? It is counterproductive to inflict civil damages upon *all* manufacturers for the side effects and medical complications which surface in the children of the users a generation after ingestion of the drugs, particularly when, at the time of their use, the drugs met every fair test and medical standard then available and applicable. Such a result requires of the pharmaceutical industry a foresight, prescience and anticipation far beyond the most exacting standards of the relevant scientific disciplines. In effect, the majority requires the pharmaceutical research laboratory to install a piece of new equipment—the psychic's crystal ball.

I am not unmindful of the serious medical consequences of plaintiffs' injuries, and the equally serious

implications to the class which she purports to represent. In balancing the various policy considerations, however, I also observe that the incidence of vaginal cancer among "DES daughters" has been variously estimated at one-tenth of 1 percent to four-tenths of 1 percent (13 Suffolk L.Rev., supra, p. 999, fn. 92.) These facts raise some penetrating questions. Ninety-nine plus percent of "DES daughters" have never developed cancer. Must a drug manufacturer to escape this blanket liability wait for a generation of testing before it may disseminate drugs? If a drug has beneficial purposes for the majority of users but harmful side-effects are later revealed for a small fraction of consumers, will the manufacturer be absolutely liable? If adverse medical consequences, wholly unknown to the most careful and meticulous of present scientists, surface in *two* or *three* generations, will similar liability be imposed? In my opinion, common sense and reality combine to warn that a "market share" theory goes too far. Legally, it expects too much.

I believe that the scales of justice tip against imposition of this new liability because of the foregoing elements of unfairness to some defendants who may have had nothing whatever to do with causing any injury, the unwarranted preference created for this particular class of plaintiffs, the violence done to traditional tort principles by the drastic expansion of liability proposed, the injury threatened to the public interest in continued unrestricted basic medical research as stressed by the Restatement, and the other reasons heretofore expressed.

The majority's decision effectively makes the entire drug industry (or at least its California members) an insurer of all injuries attributable to defective drugs of uncertain or unprovable origin, including those injuries manifesting themselves a generation later, and regardless of whether particular defendants had any part whatever in causing the claimed injury. Respectfully, I think this is unreasonable overreaction for the purpose of achieving what is perceived to be a socially satisfying result.

Finally, I am disturbed by the broad and ominous ramifications of the majority's holding. The law review comment, which is the wellspring of the majority's new theory, conceding the widespread consequences of industry-wide liability, openly acknowledges that "The DES cases are only the tip of an iceberg." (Comment, *DES and a Proposed Theory of Enterprise Liability* (1978) 46 Fordham L.Rev. 963, 1007.) Although the pharmaceutical drug industry may be the first target of this new sanction, the majority's reasoning has equally threatening application to many other areas of business and commercial activities.

Given the grave and sweeping economic, social, and medical effects of "market share" liability, the policy decision to introduce and define it should rest not with us, but with the Legislature which is currently considering not only major statutory reform of California product liability law in general, but the DES problem in particular. (See Sen. Bill No. 1392 (1979-1980 Reg. Sess.), which would establish and appropriate funds for the education, identification, and screening of persons exposed to DES, and would prohibit health care and hospital service plans from excluding or limiting coverage to persons exposed to DES.) An alternative proposal for administrative compensation, described as "a limited version of no-fault products liability" has been suggested by on commentator. (*Coggins*, supra, 13 Suffolk L.Rev. at pp. 1019-1021.) Compensation under such a plan would be awarded by an administrative tribunal from funds collected "via a tax paid by all manufacturers." (P. 1020, fn. omitted.) In any event, the problem invites a legislative rather than an attempted judicial solution.

I would affirm the judgments of dismissal.

RICHARDSON, J.

WE CONCUR:

CLARK, J.
MANUEL, J.

APPENDIX B

[1.]*

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JUDITH SINDELL, *Plaintiff and Appellant,* vs. **ABBOTT LABORATORIES, et al.,** *Defendants and Respondents.*	**2d Civil No. 51845** (Los Angeles County Super. Ct. No. C 169 127)
MAUREEN ROGERS, *Plaintiff and Appellant,* vs. **REXALL DRUG COMPANY, et al.,** *Defendants and Respondents.*	**2d Civil No. 51875** (Ventura County Super. Ct. No. 61220)

APPEAL from judgments (orders of dismissal) of the Superior Court of Los Angeles County (No. 51845). Jerry Pacht and Robert I. Weil, Judges. Reversed.

APPEAL from judgments (orders of dismissal) of the Superior Court of Ventura County (No. 51875). Steven J. Stone, Judge. Reversed.

[* The original pagination of the Court's slip opinion is indicated by these bracketed numbers to facilitate cross-reference to the Court's "modification of opinion on denial of rehearing", which modifications have not been integrated with any reported version of the original opinion.]

[2.]

* * *

[Names Of Counsel Omitted In Printing]

INTRODUCTORY STATEMENT

These appeals are from dismissals and judgments entered after the sustaining of defendants' demurrers to actions brought by Judith Sindell (hereinafter Sindell) and Maureen Rogers (hereinafter Rogers) for personal injuries allegedly resulting from prenatal exposure to diethylstilbestrol (DES). Although arising out of actions

[3.]

in the Los Angeles County and Ventura County Superior Courts, the appeals are consolidated because of common issues of fact and law.

In both actions, defendant drug manufacturers demurred on the ground that the complaints failed to state a cause of action in that there was no identification of the particular defendant which manufactured the DES that allegedly caused harm to plaintiffs; it appears that it was on this premise only that the demurrers were sustained without leave to amend. For the reasons discussed below, we reverse the judgments of dismissal.

STATEMENT OF THE CASE

Both Sindell and Rogers sue on their own behalf and as representatives of all women residing in California who are similarly situated, although Sindell limits her representative status to the portion of her complaint seeking certain equitable relief. The complaints, which are substantially identical, allege that the prerequisites for maintaining plaintiff and defendant class actions are satisfied.[1] Both actions are for money damages and

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[1] We do not address the complicated class action issues raised by the complaints as such a discussion is not necessary to our opinion.

[4.]

equitable relief and seek to hold defendants individually and jointly liable for unlawfully manufacturing, marketing, and promoting DES. The complaints allege that DES, which was ingested by plaintiffs' mothers as a miscarriage preventative, has caused plaintiffs to develop precancerous and cancerous tumors and lesions.

Sindell's Complaint

In her complaint, Sindell alleges that she has developed precancerous lesions or tumors of the vagina, cervix, and breast and a cancerous bladder tumor which has been surgically removed. Her complaint sets forth ten causes of action, each of which is alleged to arise from the individual and concerted action of the defendants in the manufacture and marketing of DES. The causes of action charge express and implied agreements among defendants and collaboration in, reliance upon, and adoption of each other's testing and marketing methods with respect to the subject drug.

In her first seven causes of action, Sindell seeks to hold defendants liable on the following theories: negligence, strict products liability, lack of informed consent, breach of express warranties, breach of implied warranties, fraud, and violations of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 et seq.).

In what is denominated an eighth cause of action,

[5.]

Sindell alleges that all activities engaged in by the defendants were the result of joint and concerted enterprise, that there existed a common and mutually agreed upon formula for the drug, that the various brands of DES were marketed by the defendants as being fungible and interchangeable with all other brands of the drug, and that there was a pharmaceutical practice of filling prescriptions of DES with a brand other than that prescribed.

The ninth cause of action sounds in conspiracy, and the tenth relates to the class aspects of the action.

Nowhere in Sindell's complaint does she identify the specific manufacturer of the DES ingested by her mother.

The general demurrers of defendants Rexall Drug Company, E. R. Squibb & Sons, Inc., and Upjohn Company were sustained without leave to amend, all on the ground that Sindell had failed in her complaint to identify the specific manufacturer of the DES which allegedly injured her. Defendant Abbott Laboratories' general demurrer was sustained with 30 days leave to amend, the court noting the absence of an "allegation that any product manufactured by demurring defendant caused any harm to plaintiff." Sindell, however, failed to thereafter amend her complaint. Defendant Eli Lilly

[6.]

and Company's motion for summary judgment was treated as a demurrer and sustained without leave to amend on the same ground as stated previously—that Sindell could not name an individual defendant.

Sindell appeals from the orders of dismissal which were subsequently entered in favor of the above named defendants.[2]

Rogers' Complaint

Rogers alleges that she has developed cervical cancer and precancerous lesions or tumors of the vagina and cervix. She also alleges that defendant manufacturers of DES have acted both individually and jointly, their "joint and concerted" actions including, but not limited to, joint testing, marketing, and promotional activity, as well as mutual exploitation of the common formula for the drug, which in turn led to the pharmaceutical practice of treating the various brands of DES as being interchangeable with one another.

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[2] The record on appeal reflects that Sindell also appealed from an order dismissing defendant Warner Lambert/Parke Davis Company following the sustaining of its demurrer without leave to amend. The parties, however, have since stipulated to a dismissal of this defendant from the action.

Rogers' first amended complaint contains the follow-

[7.]

ing six causes of action: negligence, strict products liability, breach of express warranties, breach of implied warranties, false representations, and violations of the Federal Food, Drug, and Cosmetic Act.

By amendment to her first amended complaint, Rogers has identified defendant Eli Lilly and Company as the manufacturer of the DES ingested by her mother.

The general demurrer of defendant Rexall Drug Company was sustained without leave to amend "because Rexall is nowhere in the pleadings shown to have provided or purveyed the particular drug which affected plaintiff [Rogers] . . . ." The joint demurrer of defendants E. R. Squibb & Sons, Inc. and Upjohn Company was sustained without leave to amend on the stated ground that Rogers' first amended complaint failed to allege facts sufficient to sustain a cause of action.[3]

[8.]

Rogers appeals from the orders of dismissal subsequently entered in favor of these defendants. Since Rogers identified Eli Lilly and Company as the producer of the

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[3] Although defendants E. R. Squibb & Sons, Inc. and Upjohn Company jointly demurred on a number of grounds, including bar of the statute of limitations, their supporting papers stated that "the bottom line of this demurrer, indeed of this case, is whether a plaintiff can maintain a cause of action against a product manufacturer and distributor without alleging that it actually used that manufacturer's product!" Thus, while the trial court was not specific as to its reasons for sustaining these defendants' demurrer, we assume for the purposes of this discussion that its ruling was based on the same ground as the other defendants prevailed on, i.e., failure of the plaintiff to limit herself to an individual defendant. For the reasons discussed later in this opinion, we deem it inappropriate at this point in the litigations to discuss the other possible bases for the sustaining of any of these demurrers, except insofar as they raise the limitations question.

DES taken by her mother, it remains a defendant in her case.[4]

DISCUSSION

Preliminary to our discussion, we note that since these appeals are before us on general demurrers, we must assume all allegations of fact set forth in the complaints to be true. (*Landeros v. Flood* (1976) 17 Cal.3d 399, 407; *Bayer v. Suttle* (1972) 23 Cal.App.3d 361, 363.) The question of plaintiffs' ability to prove these allegations, or the possible difficulty in making such proof, does not concern the reviewing court. (*Landeros v. Flood, supra; Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496.) Furthermore, "A general demurrer admits not only the facts expressly alleged but also facts essential to

[9.]

a cause of action which the facts alleged supply by implication or inference." (*Harvey v. City of Holtville* (1969) 271 Cal.App.2d 816, 819.)

Being thus directed by the case law noted, we observe that both the Sindell and Rogers complaints contain factual allegations which, if proven, would establish that defendants are both individually and jointly responsible for plaintiffs' injuries in that they acted in both their individual capacities and in concert in the doing of the wrongful acts which caused those injuries. This is the state of the record before us as the reviewing court.

As such, the doctrines of concerted action and alternative liability enable these complaints to stand at this stage of the proceedings. The established law of this state holds wrongdoers acting in concert jointly and severally liable where a plaintiff is unable to identify the individual defendant who actually caused the injury;

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[4] Rogers also appealed from a summary judgment which was granted to Miles Laboratories, Incorporated on the basis of an affidavit establishing that it never produced DES as a miscarriage preventative. Subsequent to filing her notice of appeal, however, Rogers stipulated in the superior court to a dismissal of Miles from the action.

allegations of concerted action satisfy the element of causation.

The doctrine of alternative liability permits shifting of the burden of proof on the issue of causation to the defendants where a plaintiff cannot attribute the injury to a specific defendant. The required allegations under this theory must demonstrate each defendant to be a

[10.]

wrongdoer acting individually as contrasted with allegations of wrongdoers acting in concert. If defendants cannot prove which defendant is actually liable, each defendant becomes jointly and severally liable.[5]

Defendants' parade of horribles and fears of "collectivized liability" or "enterprise liability" are groundless in the light of our narrow holding embracing these two California doctrines.[6]

The Concerted Action Theory

Section 876 of the Restatement of Torts, which is entitled "Persons Acting in Concert," provides in pertinent part as follows:

> "For harm resulting to a third person from the tortious conduct of another, a person is liable if he
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> ". . . .
>
> "(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or

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[5] As discussed in footnote 9, *infra*, the alternative liability theory may not be available to Rogers.

[6] As we find adequate support for our holding in existing California law, we reject plaintiffs' invitation that we adopt for this state the so-called "enterprise liability" theory. However, for an excellent discussion of the possible application of that theory to DES cases, see Note, *DES and a Proposed Theory of Enterprise Liability* (1978) 46 Fordham L.Rev. 963.

[11.]

encouragement to the other so to conduct himself, or

"(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person."

It has been noted that the rule as stated in the above section of the Restatement is clearly the law of California. (*Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100, 113, citing *Loeb v. Kimmerle* (1932) 215 Cal. 143, 150.)

Witkin states that the Restatement's definition of "joint tortfeasors" applies not only to those who act in concert to accomplish some common goal or plan and thereby cause injury, but also to "those who order, direct or permit others to do the act, *and who give assistance or encouragement.*" (Italics added.) (4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 30, pp. 2329-2330.)

Harper and James cite section 876 of the Restatement of Torts as universal authority for the proposition that wrongdoers who act in concert are jointly and severally liable. (1 Harper & James, Law of Torts (1956) § 10.1, p. 698.)

In commenting on the doctrine of concerted action,

[12.]

Prosser states that "All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him. [¶] Express agreement is not necessary, and all that is required is that there be a tacit understanding . . . ." (Fns. omitted.) (Prosser, Law of Torts (4th ed. 1971) § 46, p. 292; see also Prosser, *Joint Torts and Several Liability* (1937) 25 Cal.L.Rev. 413, 429-430.) But Prosser further notes that in pleading a cause of action based on concerted action, "It is . . . es-

sential that each particular defendant who is to be charged with responsibility shall be proceeding tortiously, which is to say with intent to commit a tort, or with negligence. One who innocently, and carefully, does an act which furthers the tortious purpose of another is not acting in concert with him." (Fn. omitted.) (Prosser, Law of Torts, *supra*, at p. 292; see also Rest., Torts, *supra*, § 875, com. a.)

This court recognizes more than a half-dozen California cases which have applied, in a variety of factual situations, the doctrine of concerted action. Most notable

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among these are: *Loeb v. Kimmerle*, *supra*, 215 Cal. 143, 150-151 (a personal injuries action); *The Weinberg Co. v. Bixby* (1921) 185 Cal. 87, 93, 106-107 (action for wrongful diversion of flood waters); *Orser v. George* (1967) 252 Cal.App.2d 660, 666-669 (wrongful death action); *Agovino v. Kunze* (1960) 181 Cal.App.2d 591 (action for personal injuries); and *Meyer v. Thomas* (1937) 18 Cal.App.2d 299, 306 (action for conversion of a promissory note).

Orser v. George, *supra*, 252 Cal.App.2d 660, summarizes California case law regarding the doctrine of concerted action and explains the rationale of the use of that theory to satisfy the element of causation in a situation where a plaintiff cannot identify the culpable defendant. *Orser* was a wrongful death action in which the trial court had granted a summary judgment in favor of two of three potentially liable defendants.[7] The three defendants were hunters who were alleged to have engaged in the tortious conduct of firing their guns at mudhens in the direction of the decedent. Two of the three defendants were alleged to have been alternatively firing the same gun, a pistol, the bullet from which was subsequently determined to have killed the decedent.

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[7] There were actually several additional defendants named in *Orser*, but their involvement is not relevant to the issues before us.

[14.]

The third defendant could not have fired the fatal bullet, but he was alleged to have been shooting with a rifle in the same line of fire as the other two defendants. (*Id.* at pp. 664-666.) As there was a triable issue of fact as to which of the two defendants using the pistol had fired the fatal shot, the appellate court reversed the summary judgment which had been granted as to one of them. (*Id.* at p. 668.) In addition, the court reversed, on a theory of concert, a summary judgment which had been entered in favor of the third, rifle-shooting defendant. The reasoning of the appellate court (which emphasized that it was concerned only with possibilities and not actual proof) was that triable issues remained as to whether the third defendant knew that his companions' conduct constituted a breach of duty owed the decedent and, further, whether his own tortious conduct in firing the rifle in the direction of the decedent had provided the other defendants' "substantial 'assistance or encouragement.'" (*Id.* at p. 668, paraphrasing Rest., Torts, *supra*, § 876, subds. (b) and (c).)

We note that, in so holding, the court in *Orser* indicated that Prosser's definition of concerted action (quoted above) is in line with both the Restatement's rule regarding joint action by tortfeasors and our

[15.]

Supreme Court's explication of that rule in a similar case, *Summers v. Tice* (1948) 33 Cal.2d 80, 85 (see discussion thereof, *infra*). (*Orser v. George*, *supra*, 252 Cal.App.2d 660, 667-668.)

The cases before us present a situation analogous to the one in *Orser*. Both the Sindell and Rogers complaints contain the identical allegation that the defendant drug manufacturers, "acting individually *and in concert*, promoted, approved, authorized, acquiesced in, and reaped profits from sales" of DES. (Italics ours.) In addition, similar language appears in both complaints to the effect that express and implied agreements existed between the defendants regarding the manufacture and marketing of DES and that the defendants collaborated

in, relied upon, acquiesced in, ratified, adopted, and exploited each other's testing (or lack thereof), marketing techniques, and promotional campaigns. The culmination of the defendants' concerted action is seen in the allegation, again common to both complaints, that there existed a common and mutually agreed upon formula for DES which permitted defendants to promote the drug as a fungible commodity, resulting in the pharmaceutical practice which permitted the filling of prescriptions for DES with a brand other than that prescribed.

[16.]

These allegations, together with others not here mentioned, satisfy the pleading requirements necessary to hold defendants jointly liable on a concerted action theory. The fact that every defendant named herein may not have manufactured the DES actually ingested by plaintiffs' mothers is not determinative since, as in *Orser*, the allegations indicate that each defendant gave "substantial 'assistance or encouragement'" to the tortious conduct of the others. (*Orser v. George, supra*, 252 Cal.App.2d 660, 668; see also Rest., Torts, *supra*, § 876, subds. (b) and (c).)

We reiterate that at this stage of the proceedings we are not concerned with the truth of plaintiffs' allegations or their ability to prove them. (*Alcorn v. Anbro Engineering, Inc., supra*, 2 Cal.3d 493, 496; cf. *Orser v. George, supra*, 252 Cal.App.2d at pp. 668-669.) Whether each defendant's conduct *actually* was a substantial factor in causing plaintiffs' injuries will be a question for the trier of fact. (Prosser, Law of Torts, *supra*, § 41, p. 240.)

[17.]

Defendants cite numerous authorities[8] for the proposition that in a products liability action it must be shown

[8] See, e.g., *Sell v. Volkswagen of America, Inc.* (6th Cir. 1974) 505 F.2d 953, 955; *Wetzel v. Eaton Corporation* (D. Minn. 1973) 62 F.R.D. 22, 28; *Thompson-Hayward Chem. Co. v.*

(Footnote continued on following page)

that the defendant actually manufactured or sold the product which caused the plaintiff's injuries. This rule, however, is only one specific illustration of the general legal principle requiring a defendant to be the cause-in-fact of a plaintiff's harm. The doctrine of concerted action embodied in section 876 of the Restatement of Torts satisfies the requisite cause-in-fact element. As Prosser states, "The defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about." (Prosser, Law of Torts, *supra*, § 41, p. 240.) Thus, where concerted action is pled it is irrelevant whether the actual manufacturer of the product which caused the injury is identified. Indeed, in *Hall v. E. I. Du Pont De Nemours & Co., Inc.* (E.D.N.Y. 1972) 345 F.Supp. 353, 372, the court noted that "the issue of who 'caused' the injury is distinctly secondary to the fact that the group engaged in joint hazardous conduct."

By alleging concerted action by defendants in the

[18.]

production and marketing of DES, the pleadings before us conform to the requirement stated in 1 Hursh & Bailey, American Law of Products Liability, *supra*, section 1:41, page 125, "that the product in question was one for whose condition the defendant was *in some way responsible.*" (Italics added.)

Further, since our holding here is grounded upon plaintiffs' allegations of cooperation and joint control among the defendant manufacturers of DES, there is no basis to defendants' expressed fears that henceforth all manufacturers of similar products will be held liable when one has been found to have produced a defective product. To the contrary, it is the law of this state that a

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[8] *continued*

Childress (Ala. 1964) 169 So.2d 305, 309; Annotation, Products Liability: Necessity and Sufficiency of Identification of Defendant as Manufacturer or Seller of Product Alleged to Have Caused Injury (1973) 51 A.L.R.3d 1344, 1349; 63 American Jurisprudence Second, Products Liability, section 5, page 12; 1 Hursh & Bailey, American Law of Products Liability (2d ed. 1974) section 1:41, pages 125-126.

defendant will not be held liable if it did not produce a defective product. Here, however, defendants are alleged to have acted jointly and in concert in the testing, marketing, and promoting of DES; if plaintiffs' allegations can be proven, it will be established that each defendant did, in fact, produce a defective product.

The factors cited above distinguish our cases from *Wetzel v. Eaton Corporation, supra,* 62 F.R.D. 22, heavily relied upon by defendants. In *Wetzel,* the court granted a summary judgment to one of two manufacturers alleged to have supplied a defective tractor component for lack of evidentiary support showing that that

[19.]

manufacturer had supplied the part which allegedly caused the plaintiff's accident. (*Id.* at pp. 28-29.) Since there was nothing to indicate that the manufacturer seeking the summary judgment had behaved tortiously toward the plaintiff, the court refused to apply California law pertaining to the concerted action or alternative liability doctrines. (*Id.* at pp. 29-30.) Here, in contrast, it is alleged that *each* named defendant has engaged in tortious conduct toward each and every plaintiff. (See fn. 10, *infra.*)

Defendants assert that they did not owe any duty to plaintiffs because of the "unavoidably unsafe products" exception to the general rules pertaining to strict liability in tort. That exception is applicable to products which, "in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use." (Rest., 2d Torts, § 402A, com. k, p. 353.) "Such a product, properly prepared, and *accompanied by proper directions and warning,* is not defective . . . ." (*Id.* at pp. 353-354, italics added.) But whether the product in question here was "incapable of being made safe" is a matter of proof which cannot be resolved by inspection of the pleadings before us. We also note that both complaints contain allegations that DES was marketed without warning of the hazards ap-

[20.]

parently inherent in its use. Moreover, the rationale given for the "unavoidably unsafe products" exception is that the benefits attaching to certain potentially harmful products outweigh the risks they pose. (*Id.* at p. 353.) In the cases at bench, it is alleged not only that defendants engaged in inadequate testing of DES, but also that whatever testing was done showed the drug to be totally ineffective as a miscarriage preventative.

Furthermore, we find unpersuasive defendants' assertions that drug manufacturers must receive more lenient treatment than other manufacturers in the area of products liability. Indeed, Justice Jackson specifically included the drug industry as subject to the duty to make adequate tests and give proper warnings in this passage from his oft-cited dissent in *Dalehite v. United States* (1953) 346 U.S. 15, 51-52: "[T]o an ever-increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions . . . . Such a dependent society . . . must require from manufacturers or producers increased integrity and caution as the only protection of its safety and well-being. Purchasers cannot try out drugs to determine whether they kill or cure. . . . Where experiment or research is necessary to determine the presence or the degree of danger,

[21.]

the product must not be tried out on the public, nor must the public be expected to possess the facilities or the technical knowledge to learn for itself of inherent but latent dangers. The claim that a hazard was not foreseen is not available to one who did not use foresight appropriate to his enterprise."

The Alternative Liability Theory

In the landmark case of *Summers v. Tice, supra,* 33 Cal.2d 80, two hunters negligently fired their guns in the direction of the plaintiff at the same time. It was impossible to ascertain which of the defendants fired the shot which injured the plaintiff. (*Id.* at p. 84.) Under these circumstances, the court held that the defendants

were jointly and severally liable unless they could absolve themselves, stating:

> "When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers—both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless." (*Id.* at p. 86.)

Justice Traynor characterized the *Summers* burden of proof rule as "based on the policy that it is preferable to hold liable a negligent defendant who did not in fact cause the injury than to deny an innocent plaintiff any

remedy when it cannot be determined which of the defendants is responsible for the harm but it appears that one of them was." (*Vasquez v. Alameda* (1958) 49 Cal.2d 674, 682-683, fn. 2 (Traynor, J. dissenting); see also *Haft v. Lone Palm Hotel* (1970) 3 Cal.3d 756, 774, fn. 19.)

The shifting burden of proof rule enunciated in *Summers*, often referred to as the doctrine of alternative liability (see Prosser, Law of Torts, *supra*, § 41, p. 243), is logically applicable to at least the allegations set forth in Sindell's complaint.[9] Those allegations, if proven,

[9] Should Rogers succeed in proving her allegation that Eli Lilly and Company manufactured the particular brand of DES ingested by her mother, she will arguably be unable to rely on the alternative liability theory since, as is apparent, it requires that a plaintiff be ignorant of the source of his or her injury. Proof that Eli Lilly and Company produced the DES

(Footnote continued on following page)

would establish that each of the defendants before us

[23.]

has engaged in tortious behavior which created undue risks for the offspring of DES users.[10] Further, in view

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[9] *continued*
taken by Rogers' mother would not, however, prevent her from having recourse to the concerted action theory discussed above. The distinction is that the alternative liability concept contemplates a situation where two or more defendants have behaved tortiously but fewer than all have actually caused the jury whereas the theory of concerted action is that all joined defendants have in some manner brought harm to the plaintiff. (See Note, *supra*, 46 Fordham L.Rev. 963, 985.)

[10] The assertion that each defendant here has engaged in the tortious conduct of producing DES distinguishes our cases from a recent decision of Division Two of this court, *Garcia v. Joseph Vince Co.* (Sept. 15, 1978, 2 Civ. 51614) ..... Cal.App.3d ..... . In that case, the plaintiff was injured in a fencing match by a sabre which was alleged to have been defectively manufactured by one of two fencing equipment suppliers. Because the allegedly defective sabre was either lost or mixed in with other sabres subsequent to the accident, the plaintiff could not establish the identity of the particular supplier who manufactured it. In affirming a judgment of nonsuit, the appellate court, relying on *Wetzel v. Eaton Corporation*, *supra*, 62 F.R.D. 22 (see discussion, *ante*), held that the alternative liability theory of *Summers v. Tice*, *supra*, 33 Cal.2d 80, was inapplicable since the plaintiff could not show, other than by conjecture, which of the two suppliers had violated a duty by manufacturing the defective blade. (*Garcia v. Joseph Vince Co.*, *supra*, at pp. .....-..... .)* Before so holding, the court had framed the issue as follows: "[W]here a plaintiff's evidence establishes that one, *but not both, of two defendants produced a defective product*, but the evidence does not disclose which one, is that sufficient evidence to permit a jury to determine liability of either defendant?" (*Garcia*, *supra*, at p. .....,** italics added.) Here, in contrast, it is alleged that *each* of the defendants has produced a defective product for the unwary public. Thus, like the hunters in *Summers* who negligently fired their guns, each of the defendant manufacturers of DES is alleged to have engaged in identical, risk-creating conduct.

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* Typed opinion pages 6-7.

** Typed opinion page 3.

of the lapse of time between the use of the instant

[24.]

product and the manifestation of its allegedly carcinogenic effects, coupled with the possibility that Sindell's mother was either prescribed more than one brand of DES or, because of the fungible nature of the drug, was dispensed a brand of DES other than that prescribed, it is reasonable to infer from Sindell's allegations that she cannot, with any degree of certainty, identify any one defendant as the purveyor of the DES which caused her harm. Under these circumstances, the doctrine of alternative liability mandates that each defendant bear the burden of proving its non-responsibility. The mere fact that there were only two defendants in *Summers* does not, we believe, preclude the principle of law enunciated therein from being applied to the greater number of defendants named here.

Defendants argue that they may be in no better position than the daughters of DES users to identify the manufacturer of the particular DES ingested by their mothers. As between the present plaintiffs and defendants, however, it seems reasonable to conclude that defendants may have the greater access to some of the pertinent records and information necessary to such an identification. In any event, the insurmountable difficulties faced by the hunters in *Summers* in showing which one of them actually shot the plaintiff did not

[25.]

deter our Supreme Court in that case from shifting the burden of proof on the issue of causation; in practical effect, the court's holding necessarily resulted in joint liability. (4 Witkin, Summary of Cal. Law, *supra*, Torts, § 625, p. 2907.)

We additionally note in this regard that the court in *Summers* found that the case of *Ybarra v. Spangard* (1944) 25 Cal.2d 486 presented "a quite analogous situation . . . ." (*Summers v. Tice*, *supra*, 33 Cal.2d 80, 86.) In *Ybarra*, the plaintiff awoke from an operation to dis-

cover that he had somehow been injured during the course of it. (25 Cal.2d at p. 488.) Since the plaintiff could not identify who or what instrumentalities caused his injuries, the Supreme Court found it appropriate to apply the doctrine of res ipsa loquitur to all hospital personnel involved in the surgery. (25 Cal.2d at pp. 490-493.) By thus allowing an inference of negligence to be raised as to all defendants, the court in *Ybarra* may actually have shifted the burden of proof to an entirely innocent, non-negligent party. Here, shifting the burden of proof would be less onerous since it is alleged that each defendant did, in fact, engage in the tortious conduct of producing and marketing DES.

The policy considerations expressed in *Summers* and *Ybarra* are apparent in another case from our Supreme

[26.]

Court, *Haft v. Lone Palm Hotel, supra*, 3 Cal.3d 756. In that case, plaintiff-survivors sued for the wrongful death of two members of the Haft family who drowned in defendants' unattended motel pool. The defendants' unlawful failure to provide a lifeguard resulted in the plaintiffs' inability to establish the proximate cause of the drownings. (*Id.* at p. 771.) Finding that "[t]he relative culpability of the parties and the burden facing plaintiffs" to be "comparable to the circumstances disclosed in *Summers* and *Ybarra*," the court held that "considerations of 'policy and justice,' . . . 'shift the burden to 'defendants to absolve [themselves] if [they] can.' [Citation.]" (*Haft v. Lone Palm Hotel, supra*, 3 Cal.3d at p. 773, brackets in original.) In so holding, the *Haft* court drew additional support from cases wherein "several negligent automobile drivers, not acting in concert, successively collide with a plaintiff's person or his property, and the resulting damage is not capable of apportionment"; the court noted that under such circumstances, "the burden 'shifts to *any defendant who might have contributed to the injuries* to prove his own *innocence* or limited liability by showing that such injuries or some particular injury did not result from his negligent conduct." (*Haft, supra*, at p. 774, italics in original.)

[27.]

In the recent case of *Dimond v. Caterpillar Tractor Co.* (1976) 65 Cal.App.3d 173, 183, the appellate court referred to *Summers*, *Ybarra*, and *Haft* in noting that "the law has stood ready to come to the aid of a hapless plaintiff who, through no fault of his own, is unable to provide direct evidence that defendant's breach of duty was proximate cause of his injuries." The court affirmed that the solution adopted in those cases is a shift in the burden of proof on the issue of causation to the defendant. (*Ibid.*)

Furthermore, th California courts have long recognized the policy objectives of insuring that the costs of injuries resulting from defective products be borne by the manufacturers that put such products on the market rather than by injured persons who are powerless to protect themselves. (*Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 30; *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 63.) The risk of injury can generally be insured by the manufacturer and distributed among the public as a cost of doing business. (*Seeley v. White Motor Co.* (1965) 63 Cal.2d 9, 18-19.) One commentator has noted that the twin goals of accident reduction and and risk distribution, first urged by Justice Traynor in his classic concurring opinion in

[28.]

Escola v. Coca Cola Bottling Co. (1944) 24 Cal.2d 453, 462, "have replaced a perceived need to insulate business enterprise from tort liability." (Ursin, *Strict Liability for Defective Business Premises—One Step Beyond* Rowland *and* Greenman (1975) 22 UCLA L.Rev. 820, 824, 846.)

We additionally note that the alternative liability doctrine has been incorporated in Restatement Second of Torts section 433B, subsection (3), wherein it is stated: "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm." The

rationale for this rule is stated to be "the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and resulting harm has made it difficult or impossible to prove which of them has caused the harm." (Rest., 2d Torts, *supra*, § 433B, com. f, at p. 446.)

Absent a contrary statute or decision in this state, the Restatements are accorded the status of persuasive authority. (See *Canfield v. Security-First Nat. Bank* (1939) 13 Cal.2d 1, 30-31; *Standard Oil Co. v. Oil,*

[29.]

Chemical etc. Internat. Union (1972) 23 Cal.App.3d 585, 589.)

Defendants maintain that subsection (3) of section 433B should not be applied here since not all manufacturers of DES are before the court. One of the comments to that subsection does indicate that thus far all actors have been joined as defendants in cases in which the subsection has been found applicable, and further recognizes that cases may arise where adjustments to the rule might be necessary because of the complications involved in joining all defendants, such as those resulting from the effect of time lapses. (Rest., 2d Torts, *supra*, § 433B, com. h, at p. 446.) We, however, like the Restatement, do not purport to deal with all the possible problems which may arise from the application of the alternative liability doctrine to the situation before us; the difficulties to be faced at trial are no doubt great. We hold only that at this pleading stage of the litigation we see no logical impediment to the application of that doctrine. Moreover, defendants have ignored the possibility of bringing in the remaining DES manufacturers as cross-defendants pursuant to Code of Civil Procedure section 428.10, subdivision (b). (See *American*

[30.]

Motorcycle Assn. v. Superior Court (1978) 20 Cal.3d 578, 604-607.)

Other Possible Grounds for the Sustaining of These Demurrers

Several of the defendants assert that even if their demurrers were improperly sustained on the ground of plaintiffs' failure to specify an individual defendant, the rulings of the courts below should nevertheless be upheld by reference to the other grounds stated in the demurrers.

While we are cognizant that a reviewing court is not limited to the reasons specified by the trial court when it is asked to determine whether a general demurrer was properly sustained (*Altman v. Morris Plan Co.* (1976) 58 Cal.App.3d 951, 962; *Sackett v. Wyatt* (1973) 32 Cal.App.3d 592, 598, fn. 2), we conclude that it would be inappropriate at this time to attempt to deal with all of the alleged insufficiencies in the pleadings before us. A review of the documents related to the demurrers reveals that the question regarding the necessity of specifying which defendant manufactured the DES ingested by each plaintiff's mother has been so pervasive in the proceedings up to this point that it is unlikely the other possible bases for sustaining the demurrers have received the treatment in the trial courts they deserve.

[31.]

The fact that, with one exception, each of the demurrers was sustained without leave to amend reflects the lack of opportunity the parties have had to refine the pleadings at the trial court level. Our holding herein does not, of course, prohibit the respective superior courts from now giving consideration to the other grounds stated in the demurrers should defendants choose to reassert them upon remand.[11]

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[11] We note that except for the proximate cause question raised by plaintiffs' failure to identify the manufacturer(s) of the drug taken by their mothers and the possible bar of the statute of limitations, both of which issues are discussed herein, the objections raised by defendants' general demurrers went to individual causes of action, rather than to the complaints as a whole. Defendants also supplemented their

(Footnote continued on following page)

Expedience, however, mandates that we address at least the limitations question raised by the instant demurrers since a determination adverse to plaintiffs on

[32.]

that issue would completely dispose of these cases. We note preliminarily in this regard that the demurrers would only be sustainable on the ground of the bar of the statute of limitations if the faces of the complaints *affirmatively* disclose facts showing the availability of that defense. (*Valvo v. University of Southern California* (1977) 67 Cal.App.3d 887, 895; 3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, § 797, p. 2410.)

Defendants' limitations argument is premised on the assumption that the applicable period is governed by Civil Code section 29, which provides:

> "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth; but any action by or on behalf of a minor for personal injuries sustained prior to or in the course of his birth must be brought within six years from the date of the birth of the minor, and the time such minor is under any disability mentioned in Section 352 of the Code of Civil Procedure shall not be excluded in computing the time limited for the commencement of the action."

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[11] *continued*

general demurrers by interposing numerous special demurrers for uncertainty.

In *Stowe v. Fritzie Hotels, Inc.* (1955) 44 Cal.2d 416, 425, our Supreme Court stated:

> "When a demurrer based upon both general and special grounds is sustained and the order mentions only the general ground, impliedly the ruling was made either without consideration of the special grounds or upon a determination that they are not well taken. If the general demurrer was sustained erroneously, the trial judge should be directed to consider the special grounds."

(See also *Briscoe v. Reader's Digest Assoc., Inc.* (1971) 4 Cal.3d 529, 544.)

That section, however, appears not to be directed toward situations like those before us, namely, where the tortious conduct occurred prior to birth but the injury did not manifest itself until long after infancy.[12] (Cf. *G. D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 25.)

[33.]

In view of the unusual circumstances present here, we conclude that these actions are governed by the one-year limitations period prescribed in Code of Civil Procedure section 340, subdivision 3, which, in cases involving injury from drug ingestion, does not begin to run until the time the plaintiff discovers or in the exercise of reasonable care should have discovered that he or she has been damaged by the defendant's product. (*Warrington v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 564, 566-567.)

Turning to the pleadings before us, we note that Rogers appears to have filed her original action on July 15, 1976. In her first amended complaint, filed December 17, 1976, it is alleged that in August of 1975 Rogers' mother received a letter from the Chicago Lying-In Hospital, dated July 15, 1975,[13] indicating that the hospital was conducting tests to determine a possible link between DES and abnormalities in the offspring of women who were prescribed the drug during their pregnancies. Thereafter, in October 1975, Rogers was examined and found to have cervical cancer. She further

[34.]

alleges that "Prior to this time plaintiff was completely unaware of this condition, having experienced no noticable [*sic*] symptoms and having been advised of no

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[12] It is alleged in both complaints that the cancer caused by DES exposure is believed to strike after a minimum latent period of ten to twelve years.

[13] Rogers' first amended complaint actually states that the hospital's letter was dated July 15, 1976, an obvious typographical error.

abnormal growths in any of her previous annual gynocological [*sic*] examinations." Rogers' age is not stated in her pleadings. Under these alleged facts, it is clear that Rogers' original complaint was filed within one year of the earliest reasonable opportunity she had to discover that she may have been injured by exposure to DES.

Sindell's complaint was filed on August 2, 1976. It alleges that Sindell was alerted "in the past year by newspaper reports" of the possible connection between DES and the development of cancerous and precancerous growths in women exposed to the drug before birth. It is further alleged that a subsequent gynecological examination revealed that Sindell had developed vaginal and cervical adenosis and that she thereafter suffered surgery in May 1976 for the removal of a cancerous bladder tumor. Sindell's age is not alleged. While her complaint is less than a model pleading in this regard, we conclude that nothing on the face of it affirmatively discloses that Sindell is barred by the one-year limitations period from pursuing her action.

DISPOSITION

[35.]

The judgments (orders of dismissal) entered in favor of defendants Abbott Laboratories, Eli Lilly and Company, Rexall Drug Company, E. R. Squibb & Sons, Inc., and Upjohn Company in No. 51845 and in favor of defendants Rexall Drug Company, E. R. Squibb & Sons, Inc., and Upjohn Company in No. 51875 are reversed and the causes remanded for further proceedings not inconsistent with the views herein expressed.

CERTIFIED FOR PUBLICATION

KLEIN, P.J.

We concur:

ALLPORT, J.

POTTER, J.

[1.]

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JUDITH SINDELL, *Plaintiff and Appellant,* vs. **ABBOTT LABORATORIES, et al.,** *Defendants and Respondents.*	**2d Civil No. 51845** (Los Angeles County Super. Ct. No. C 169 127)
MAUREEN ROGERS, *Plaintiff and Appellant,* vs. **REXALL DRUG COMPANY, et al.,** *Defendants and Respondents.*	**2d Civil No. 51875** (Ventura County Super. Ct. No. 61220)

MODIFICATION OF OPINION
ON DENIAL OF REHEARING

THE COURT:

The opinion in the above entitled case, filed September 21, 1978, is modified as follows:

1. On page 9, the first sentence of the second full paragraph, beginning with "As such, the doctrines of

[2.]

. . . ," is added to the preceding paragraph. The remainder of the material on page 9 following the first sentence of the second full paragraph is stricken.

2. On page 10, strike the first four lines counting from the top of the page, and also footnote 5, which appears at the bottom of the page. Footnote 6 is renumbered as footnote 5.

3. On page 13, the first sentence of the first full paragraph on that page is modified to read:

> *Orser v. George, supra,* 252 Cal.App.2d 660, summarizes California case law regarding the doctrine of concerted action and explains the rationale of the use of that theory to establish the element of causation.

Footnote 7 on page 13 should be renumbered as footnote 6.

4. On page 16, footnote 8 is renumbered as footnote 7.

5. On page 18, line 15 from the top of the page is modified to read:

> to have acted jointly and in concert in the manufacturing, testing,

6. On page 22, footnote 9 should be renumbered as footnote 8.

7. Pages 23 and 24 are deleted and substituted in their place is the following:

[3.]

undue risks for the offspring of DES users.[9] Further, although Sindell did not specifically allege

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[9] The assertion that each defendant here has engaged in the tortious conduct of producing DES distinguishes our cases from a recent decision of Division Two of this court, *Garcia v. Joseph Vince Co.* (Sept. 15, 1978, 2 Civ. 51614) ..... Cal.App.3d ..... . In that case, the plaintiff was injured in a fencing match by a sabre which was alleged to have been defectively manufactured by one of two fencing equipment suppliers. Because the allegedly defective sabre was either lost or mixed in with other sabres subsequent to the accident, the plaintiff could not establish the identity of the particular supplier who manufactured it. In affirming a judgment of nonsuit, the

(Footnote continued on following page)

in her complaint that she is incapable of identifying

[4.]

the particular manufacturer of the DES which caused her harm, her counsel apparently did represent to the court at the hearings on the demurrers that she lacks the knowledge requisite to such an identification.[10] That Sindell is unable to name an individual defendant appears reasonably likely in view of the lapse of time occurring between the use of DES and the manifestation of its allegedly carcinogenic effects, as well as the tracing problems engendered by the treatment of the drug as a fungi-

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[9] *continued*
appellate court, relying on *Wetzel v. Eaton Corporation, supra,* 62 F.R.D. 22 (see discussion, *ante*), held that the alternative liability theory of *Summers v. Tice, supra,* 33 Cal.2d 80, was inapplicable since the plaintiff could not show, other than by conjecture, which of the two suppliers had violated a duty to him by manufacturing the defective blade. (*Garcia v. Joseph Vince Co., supra,* at pp. .....-..... .)* Before so holding, the court had framed the issue as follows: "[W]here a plaintiff's evidence establishes that one, *but not both, of two defendants produced a defective product,* but the evidence does not disclose which one, is that sufficient evidence to permit a jury to determine liability of either defendant?" (*Garcia, supra,* at p. .....,** italics added.) Here, in contrast, it is alleged that *each* of the defendants has produced a defective product for the unwary public. Thus, like the hunters in *Summers* who negligently fired their guns, each of the defendant manufacturers of DES is alleged to have engaged in identical, risk-creating conduct.

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* Typed opinion pages 6-7.

** Typed opinion page 3.

[10] The court's minute orders sustaining the demurrers of defendants Rexall Drug Company and Eli Lilly and Company on January 24, 1977, and defendants E. R. Squibb & Sons, Inc. and Upjohn Company on March 14, 1977, reflect that Sindell had averred in the proceedings that she cannot name an individual defendant. In fact, Sindell's admission in this regard is referred to in the joint brief filed with this court by Squibb and Upjohn.

ble product. On remand, however, Sindell should amend her pleadings to indicate with more particularity what her abilities are with respect to the identification of the manufacturer of the DES ingested by her mother. (See *Summers v. Tice*, supra, 33 Cal.2d 80, 88.)

[5.]

Assuming that Sindell can amend her complaint to allege lack of knowledge as to which producer of DES caused her injuries, then the doctrine of alternative liability mandates that each defendant here bear the burden of proving its nonresponsibility. The mere fact that there were only two defendants in *Summers* does not, we believe, preclude the principle of law enunciated therein from being applied to the greater number of defendants named here.

Defendants argue that they may be in no better position than the daughters of DES users to identify the manufacturer of the particular DES ingested by their mothers, but the insurmountable difficulties faced by the hunters in *Summers* in showing which one of them actually shot the plaintiff did not deter our Supreme Court in

8. On page 29, the fourth line from the bottom of the page is modifed to read:

ignored the possibility of bringing in other DES

[6.]

9. On page 35, the following is to be added to the last line of text appearing thereon:

In No. 51845, the superior court is directed to permit plaintiff Sindell to amend her complaint so as to indicate whether or not she is capable of identifying the particular manufacturer of the DES ingested by her mother.

The opinion having been so modified, defendants' petitions for a rehearing are denied.

[1.]

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JUDITH SINDELL, *Plaintiff and Appellant,* vs. **ABBOTT LABORATORIES, et al.,** *Defendants and Respondents.*	**2d Civil No. 51845** (Los Angeles County Super. Ct. No. C 169 127)
MAUREEN ROGERS, *Plaintiff and Appellant,* vs. **REXALL DRUG COMPANY, et al.,** *Defendants and Respondents.*	**2d Civil No. 51875** (Ventura County Super. Ct. No. 61220)

MODIFICATION OF ORDER
TO CORRECT CLERICAL ERROR

THE COURT:

For the purpose of correcting a clerical error, the order entitled "Modification Of Opinion On Denial Of Rehearing," filed herein on October 19, 1978, is ordered modified as follows:

On page 5, the comma appearing in the fifth line of the second paragraph is to be replaced by a period, and the next word, "but," is to be capitalized.

[2.]

As so corrected, the fifth line of the second paragraph on page 5 should read:

mothers. But the insurmountable diffi-

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JUDITH SINDELL, *Plaintiff and Appellant,* vs. **ABBOTT LABORATORIES, et al.,** *Defendants and Respondents.*	**L.A. No. 31063**
MAUREEN ROGERS, *Plaintiff and Appellant,* vs. **REXALL DRUG COMPANY, et al.,** *Defendants and Respondents.*	

Appeals from

Superior Court of Los Angeles County
Hon. JERRY PACHT, Judge
Hon. ROBERT I. WEIL, Judge

Superior Court of Ventura County
Hon. STEVEN J. STONE, Judge

PETITION OF ABBOTT LABORATORIES FOR REHEARING

[Excerpts]

INTRODUCTION

While the Court has very properly rejected each of the theories of liability proposed by plaintiffs to eliminate proof of causation in these cases, it has proceeded on its own initiative to devise a new theory of "market share liability." This new rule, which attempts to substitute a scheme of damage apportionment for evidence of cause, represents a fundamental departure from the law's traditional and primary concern with individual rights and responsibilities. That apportionment scheme, which derives principally from an academic exercise at Fordham University, necessarily rests upon a series of internally inconsistent and demonstrably false assumptions. Application of the Fordham apportionment proposal in the real world of litigation would deprive defendants of the due process of law which the Constitution guarantees, by subjecting them to an inevitably arbitrary and unreasoned rule of liability, as well as unfair, discriminatory rules of procedure and evidence. We submit that, for the reasons set forth in this Petition, the Court's market share liability theory must not be allowed to become the law of this State.

I.

THE MARKET SHARE LIABILITY THEORY ADOPTED, *SUA SPONTE*, BY THIS COURT, IS PREDICATED UPON FALLACIOUS ASSUMPTIONS THAT ARBITRARILY AND IRRATIONALLY IMPOSE LIABILITY ON DEFENDANTS IN VIOLATION OF THEIR CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

* * *

II.

THE FORDHAM THEORY OF "MARKET SHARE" LIABILITY WOULD DEPRIVE DEFENDANTS OF DUE PROCESS BY ARBITRARILY AND UNFAIRLY DISCRIMINATING BETWEEN METHODS OF PROOF.

* * *

CONCLUSION

The law of torts, like any other body of substantive law, must operate within the boundaries defined by the constitutional guarantee of due process. The Court's scheme of market share compensation fails this critical test, because its application would subject defendants to arbitrary and unreasoned deprivations and would require the application of irrational and discriminatory rules of evidence and procedure. For the reasons set forth in this Petition, the fundamental principle that causation must be proved as a condition to the imposition of tort liability should not be violated. The orders of the trial courts sustaining demurrers to the complaints should be affirmed.

* * *

C4

ORDER DUE
May 19, 1980

ORDER DENYING REHEARING

L.A. No. 31063

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

SINDELL

v.

ABBOTT LABORATORIES

ROGERS

v.

REXALL DRUG COMPANY ET AL.

Tobriner, J., did not participate. White, J., sitting under assignment by the Chairperson of the Judicial Council.

Respondents' petitions for rehearing DENIED.

Clark, J., Richardson, J., and Manuel, J., are of the opinion that the petitions should be granted.

/s/ BIRD, Chief Justice

[Certification omitted in printing]

SUPREME COURT
FILED
MAY 7 1980
G. E. BISHEL, Clerk
Deputy

see 80

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